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No. 140

Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of Matters Involved	1
Basis of Jurisdiction	11
(a) Statutory Provisions Sustaining Jurisdiction	11
(b) Federal Statute Under Which Rights are Claimed	11
(c) Date of Decree of State Court	12
(d) Nature of Case and Ruling Below	12
(e) Cases Believed to Sustain Jurisdiction	14
Questions Presented	19
Reasons Relied on for the Allowance of the Writ	21
Brief in Support of Petition	27
Opinion of the Court Below	27
Statement as to Jurisdiction	27
Statement of the Case	28
Specifications of Error	28
Summary of Argument	30
Argument	35
Conclusion	50, 51

TABLE OF CASES CITED.

Allen v. Quercus Lumber Co., 171 Mo. App. 492, 157 S. W. 661	31, 36
Baltimore & P. R. R. Co. v. Jones, 95 U. S. 439, l. c. 441, 442	32, 39

PAGE

Barber v. Kellogg, 339 Mo. 677, 123 S. W. (2d) 100 ..... 33, 47

Barrentine v. Henry Wrape Co., 105 Ark. 485, 152 S. W. 158 ..... 31, 35

Barry v. Frisco Ry. Co., 324 Mo. 775, 26 S. W. (2d) 988 17

Blain v. Huttig, etc. Co., 232 Mo. App. 870, 105 S. W. (2d) 946 ..... 31, 37

Blaisdell v. L. I. Ry. Co., 136 N. Y. S. 760..... 31, 36

Brady v. Terminal Railroad Association, 303 U. S. 10, 58 S. C. R. 426, 82 L. Ed. 614 14

Brock v. Mobile R. Co., 336 Mo. 918, 51 S. W. (2d) 100, Cert. Den. 53 S. C. R. 87, 287 U. S. 638 47

Charnock v. T. & P. Ry. Co., 194 U. S. 432, 24 S. C. R. 671, l. c. 672 ..... 32, 39

Chicago Railroad Company v. Devine, 239 U. S. 52, 36 S. C. R. 27, 60 L. Ed. 140 15

Crawford v. Davis, 136 S. C. 95, 134 S. E. 247, 251 .....22, 32, 40

Davis v. Merrill, 133 Va. 69, 112 S. E. 628..... 31, 36

Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N. W. 54 .....30, 35, 38

DeAtley v. C. & O. Ry. Co., 201 Fed. 591 .....22, 32, 40

Evans v. Santa Fe, 345 Mo. 147, 131 S. W. (2d) 604 ..... 34, 50

Fletcher v. B. & P. Ry. Co., 168 U. S. 135, 18 S. C. R. 35 .....22, 31, 36, 42

Frisco v. Mills, 271 U. S. 344, 46 S. C. R. 520.. 33, 47

Galveston, etc. Ry. Co. v. Waldo, (Tex.), 77 S. W. (2d) 326 ..... 31, 36

Griffin v. B. & O. R. Co., 96 W. Va. 302, 122 S. E. 912 .....22, 32, 42, 44

Hagel v. H. H. Franklin Co., 199 N. Y. 388, 92 N. E. 794 ..... 31, 36

PAGE

Henry Wrape Co. v. Barrentine, 138 Ark. 267, 211 S. W. 366 ..... 31, 35

Isaacs v. Smith, (Mo. App.), 275 S. W. 555.... 31, 36

Jamison v. Encarnacion, 271 U. S. 635, 50 S. C. R. 440 .....21, 32, 39

Jenkins v. Kurn, 313 U. S. 256, 85 L. Ed. 851.. 34, 50

Lambert v. Jones, (Mo.), 98 S. W. (2d) 752, l. c. 756 ..... 33, 47

Lloyd v. Alton R. Co., (Mo.), 159 S. W. (2d) 267 32, 40

Matthison v. Payne, 98 N. J. Law 87, 118 Atl. 771 33, 47

McAllister v. St. Louis Merchants Bridge Terminal Rly. Co., 324 Mo. 1005, 25 S. W. (2d) 791 16

McDuff v. Kurn, (Ala.), 172 So. 886 .....22, 23, 32, 40

McFadden, et al. v. Catron, 138 Mo. 197, 39 S. W. 771 15

Minn., et. Ry. Co. v. Rock, 279 U. S. 410, 49 S. C. R. 363, 365 .....22, 32, 41

Missouri, K. & T. Ry. Co. v. Day, 104 Tex. 237, 136 S. W. 435 ..... 31, 35

Missouri, K. & T. Ry. Co. v. Elliott, 184 U. S. 530, 22 S. C. R. 446 17

Morris v. M. P. Ry. Co., 107 Neb. 788, 187 N. W. 130 .....22, 32, 41

Neustiehl v. Freedman, 153 N. Y. S. 120 ..... 31, 36

Newkirk v. Pryor, (K. C. App.), 183 S. W. 682 34, 49

Palmer v. Keene, 80 N. H. 68, 112 Atl. 798 .... 31, 36

Riley v. Wabash Ry. Co., 328 Mo. 910, 44 S. W. (2d) 136, 142 17

Rofsky v. City, 12 N. Y. S. (2d) 560 ..... 31, 36

Ross v. L. & N. R. Co., 178 Miss. 69, 172 So. 752 33, 49

Seaboard Airline Railroad Co. v. Horton, 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062 15

Seaboard Airline Ry. Co. v. Latham, 23 Ala. App. 490, 127 So. 679 ..... 33, 49

PAGE

Simmons v. Louisiana Railroad Co., 149 La. 686, 90 So. 24 ..... 33, 49

Smithson v. A. T. & S. F. Ry. Co., 174 Cal. 148, 162 Pac. 111, 113 .....22, 32, 40

Southern R. Co. v. Gray, 211 U. S. 333, 36 S. C. R. 558, l. c. 561 21

State v. Duestrow, 137 Mo. 44, 39 S. W. 266.... 15

Stool v. Southern Pacific, 88 Ore. 350, 172 Pac. 101 ..... 34, 49

Stuart v. K. C., 102 Kan. 307 ..... 31, 37

Swinanton v. LeBoutiler, 28 N. Y. 553, 148 N. Y. 752 ..... 31, 36

Tapore v. Boston M. R. Co., 78 N. Y. 536 ..... 33, 47

Thom v. N. Pac. R. R. Co., 190 Minn. 622, 252 N. W. 660 ..... 33, 49

Toledo Railroad Company v. Slavin, 236 U. S. 454, 35 S. C. R. 306, 59 L. Ed. 671 15

Wabash Rld. Co. v. Pearce, 192 U. S. 179, 24 S. C. R. 231 17

Waggoner Elec. Mfg. Co. v. Lyndon. 262 U. S. 226, 43 S. C. R. 589, 591 17

Waldo v. Galveston, etc. Co., (Tex.), 50 S. W. (2d) 274 ..... 31, 35

Washington T. Co. v. Callahan, 276 F. 334.... 33, 47

White v. K. C. Stock Yards, 104 Kan. 90 ..... 31, 37

Williams v. M. P. R. Co., 109 Mo. 475, 18 S. W. 1098 ..... 31, 36

Yazoo and Midland Valley R. Co. v. Hare, 104 Miss. 564, 61 So. 648 ..... 31, 36

Zabawa v. Oberbeck, 146 Wisc. 621, 131 N. W. 826 31, 35

STATUTES CITED.

Constitution of Missouri, Sec 4 of Amendment of 1890, Article 6 .....15, 16, 17

PAGE

Federal Employers' Liability Act (53 Stat. 1404, 45 U. S. C. A., Sec. 51, *et seq.*, as Amended Effective August 11, 1939) 2, 11, 12, 19, 21, 28, 32, 38

Judicial Code, Section 237, as Amended by the Act of Feb. 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937 (U. S. Code Annotated, Title 28, Sec. 344 and Sec. 344b) 11, 28

TEXT BOOKS CITED.

Corpus Juris, Vol. 39, page 266 ..... 22, 32

Restatement of the Law, Torts, Sec. 317.....30, 35, 38

Roberts, Federal Liability of Carriers, page 1545..22, 32,41

Ruling Case Law, Vol. 4, Sec. 650 ..... 30, 35

Sherman and Redfield on Negligence, Revised Edition,

Vol. 1, Sec. 8 ..... 33, 47

Vol. 1, Sec. 160, page 361 ..... 30, 35

Vol. 2, Sec. 199, pages 456-459 ..... 30, 35

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Eugene W. Osment, respectfully shows as grounds for the issuance of a writ of certiorari to the Supreme Court of the State of Missouri:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action for damages for permanent and totally disabling bodily injuries sustained by petitioner

August 21, 1939, while acting within the scope of his duties as an employee of respondents. The action was brought under the Federal Employers' Liability Act as amended effective August 11, 1939 (45 U. S. C. A., Sec. 51, et seq.), 52 Stat. 1404. A jury rendered a verdict for Fifty Thousand Dollars in petitioner's favor in the trial court, which was reduced on remittitur to Thirty-five Thousand Dollars, and judgment entered thereon (R. a-c 306, 500-501). There was no dispute as to the applicability of the Federal Employers' Liability Act (R. 13, 14, 510). The judgment was reversed outright on appeal to the Supreme Court of Missouri (R. 516).

Petitioner was a member of an interstate switching crew. He was standing by the drinking fountain in respondents' freight house awaiting orders when one John Stalac, a messenger employed by respondents, and known by them to be habitually addicted to rough and dangerous horseplay, in walking through the freight house with papers, walked up behind petitioner, seized him around his neck and shoulder in such a manner that he could not get loose, and squeezed his windpipe so tightly he finally lost consciousness and eventually fell to the floor, fracturing his skull on the concrete floor. One Finnell, a member of the railway police, was a few feet away at the time but failed to act to prevent the seizure and injury although he had time to do so (Opinion of Mo. Ct., R. 510-511).

The Missouri court held that although the evidence was sufficient to show negligence on the part of respondent's officers, and agents in retaining such dangerous and habitually reckless servant, known to indulge in dangerous horseplay on its premises as would entitle plaintiff to a recovery under the common law of

negligence, there could be no recovery under the Federal Employers' Liability Act; and on the second theory held that although a member of respondents' police force was present with the ability and means of preventing the injury, there could be no recovery under the Federal Act for his failure to perform his duty, because of its ruling as to the first theory (R. 510-516).

FIRST THEORY OF RECOVERY.

(a) Pleadings.

It was alleged that Stalac was "incompetent, habitually careless, and an improper and dangerous person to have and retain in such employment, and defendant knew he was young, big, strong and had propensities to show his power by scuffling and grappling and violently seizing other employees from behind, and that he was dangerous in and near the employment of other of defendants' agents and the plaintiff herein;" that said Stalac had on many occasions assaulted, seized, beaten up, attacked, scuffled, injured and threatened to injure many different employees of defendant over a long period of time, all of which facts were known to defendant, and, "Plaintiff further states that said defendant company, its agents and servants, carelessly and negligently retained and continued the said agent John Stalac in its employment aforesaid after defendant company, its officers and agents knew or by the exercise of ordinary care could or should have known of the foregoing facts about said Stalac" (R. 2-6).

(b) Evidence.

Petitioner's proof showed that John Stalac habitually engaged in rough horseplay and the railroad had knowledge of the fact (Opinion R. 510). He was a large, rough fellow, always engaging in horseplay. The fore-

man and the other members of plaintiff's switching crew testified that they had seen Stalac scuffling with other railroad employees who were on the job, although this was contrary to instructions, and that he displayed himself like a prizefighter and sparred with other men. Plaintiff testified that he was "a fellow that liked to scuffle with the fellows;" that he had grabbed other men and thrown them around and tussled with them; that he would grab them around the neck and shoulders and scuffle with them and throw them down. Three negroes employed in the warehouse testified that he was strong and scuffled with other employees and was "over average rough;" that he would grab them by the neck or arm or go along and hit them in the back of the legs so that they would go down; that he would grab men and lift them up until their face turned red; that he would bear down on the rear end of a loaded truck as it was being pulled and cause the handle to fly up. Once he had grabbed a freight house employee's breast so hard that he had to have medical attention and there was evidence that these practices had continued for four or five years. Although he did not act in anger, he was continually engaged in dangerous and unnecessarily rough horseplay. The defendants introduced no testimony to contradict that of plaintiff and put no witnesses on the stand, except medical witnesses (R. 27, 28, 34, 41, 46, 58-60, 62-63, 85, 87, 88, 90, 94, 96, 100-105, 109-110, 111, 113, 114, 116, 118-119, 157, 161).

(c) Petitioner's Claim.

Petitioner claims that respondents had a duty to exercise reasonable care not to employ or keep in service servants known to misconduct themselves outside the course of their employment so as to create a risk of danger of bodily harm to other employees. It is peti-

tioner's first theory of recovery that this duty was breached by negligently retaining in their employment a servant who, to their knowledge, was in the habit of misconducting himself in a manner dangerous to others. Petitioner contends that such doctrine of common law tort liability forms a basis of recovery under the Federal Employers' Liability Act.

(d) Holding of Missouri Court.

The Supreme Court of Missouri, after setting out the pleadings and the facts, recognized the existence of the theory of recovery sought to be invoked and cited the cases supporting such theory of common law recovery. It went on to hold that the Federal courts might also recognize petitioner's theory of recovery, "and construe the conduct complained of as being negligent." The sole reason given for reversal is that under the Federal Employers' Liability Act, "The Supreme Court of the United States * * * has refused to impose liability on employers for acts of employees when outside the scope of their employment and not in furtherance of their employers' business" (R. 510-512). This holding does not pass on the question at issue. No court, as far as we know, has ever imposed liability upon an employer for the *act* of an employee outside the scope of his employment, on the theory of *respondeat superior*. Petitioner did not seek recovery on the theory that the *act* of Stalac was the *act of the company*. Petitioner seeks to hold the respondents for the *acts of Stalac's superiors* in retaining him with knowledge of his propensities.

SECOND THEORY OF RECOVERY.

The second theory of recovery pleaded, shown by the evidence, and submitted in the instruction is entirely

separate and apart from the first. It is based on the failure of Finnell, a member of the special service department, engaged in the course of his duties, to act to prevent the plaintiff's injuries when he was charged by the company with acting under such circumstances. Petitioner contends that he had a right to go to the jury on this theory even if the first theory of negligence in retaining Stalac were completely out of the case.

(a) Pleadings.

As its second ground of recovery, plaintiff alleged that the respondents, "employed, provided, and maintained one Finnell as a peace officer, that part of his duties within the scope of his employment was to warn, prevent, and stop any and all bodily attacks, seizures, fights, assaults, dangerous and pugnacious conduct aforesaid in his presence by one employee, upon the person of another and more particularly plaintiff under the circumstances;" that said police officer acting within the scope of his employment knew or by due care could have known of Stalac's habits and disposition and that he was present at the time and permitted said assault, "when, in the exercise of ordinary care and in the scope and duty of employment, said defendant company, by and through its agent and peace officer, with the means at hand and in time, could or should have stopped and prevented said danger to the plaintiff and the seizure aforesaid and could or should have warned the plaintiff of the presence of said dangerous John Stalac and of the impending seizure and attack in time, by the exercise of ordinary care, to have prevented same and to have prevented the resultant permanent injuries after the seizure and peril to plaintiff arose, all of which the defendant company, by and through its agent, servant and peace officer, carelessly and negligently failed to do" (R. 5-6).

(b) Evidence.

The evidence showed that respondents had created a Special Service Department extending over its entire system which undertook a general and continuing duty at all times, not based upon any specific occurrence or any specific man; that it was organized to preserve order upon the premises of the company, to aid in quelling disturbances, to uphold and enforce the law, to prevent an immediate breach of the peace, and to act as a preventive force in regard to unlawful violence. It was admitted that at the time of the assault in question one Walter Finnell was acting as a patrolman in this department in the scope of his employment for defendant (R. 13, 14, 17-19, 289, 290).

In performing the duties placed on them by the company, members of the department acted to control conduct of employees outside the scope of their employment. Finnell in performing the duties thus assumed by the company in creating the department, and in acting for the company in that department had at various times spoken to different employees about engaging in horseplay on the premises and had instructed them to stop it (R. 46, 67). On previous occurrences, he had warned Stalac to stop his rough scuffling and to quit playing before he hurt somebody (R. 94). Finnell had been present on numerous occasions when Stalac was engaged in such conduct (R. 91, 92, 94, 105, 106). Brown, another member of that department, had also observed such conduct (R. 106). After the assault Finnell told Osment that he had talked to Stalac about his "rough stuff" before and warned him to quit it, and said, "Now you are hurt and I have got to report it" (R. 121).

Thornhill, another member of the department, had talked to Stalac about this conduct and warned him to

quit it because he knew that if it was kept up he was going to hurt someone (R. 140, 226).

Finnell had given orders and instructions about conduct to various employees prior to the occurrence in question (R. 67). Following the occurrence, Finnell made a report to his superior (R. 66).

The uncontradicted evidence showed that Finnell saw Stalac, a big, powerful man whose past dangerous propensities and practices he well knew, come quietly straight up behind Osment without turning, although he could have gone around Osment, place his left arm around Osment's neck and reach around so as to grip his left hand on Osment's other shoulder for the purpose of getting a better grip, squeezing Osment's wind pipe and main artery and pull Osment back against him, and the upper part of his body was bent backward, and Osment was held so tight he could not move or speak, and he was thus held until his eyes showed the effect of the force and his knees wobbled and gave way and he became limp and unconscious and Stalac then released him and Osment fell to the floor and then fell backwards and struck his head on the concrete. All the time this was going on, Finnell was within two to five feet of Osment and Stalac and the witnesses testified that Osment was held for 30 to 40 seconds before losing consciousness (R. 21-27, 33, 36, 40-45, 49, 64, 68, 69). The evidence thereon is collected and set out in the motion for rehearing (R. 539-541).

It was uncontradicted that during all this time Finnell said nothing, gave no orders, and did absolutely nothing, although others watching the occurrence saw all that took place and became alarmed (R. 22-24, 24-27, 33, 36, 40-42, 43, 44, 45, 49, 64, 68, 69).

(c) Petitioner's Claim.

It was petitioner's position under the second theory of recovery that he would be entitled to recover under those facts in the absence of any duty owed by the railroad to retain only fit and competent servants, since they had voluntarily assumed and had been performing a continuing duty through the Special Service Department, which Finnell represented, of controlling the unauthorized conduct of employees on the premises and protecting employees from unlawful violence and danger and of preventing just such type of occurrence as resulted in plaintiff's injury.

(d) Court's Holding.

The Supreme Court of Missouri, in denying recovery on this theory, said:

> "But, since there is no liability for the acts complained of, does it not follow that there could be no duty to guard against them or prohibit them? Even though Finnell, the company policeman, knew of Stalac's propensities, can liability or a breach of duty be predicated on failure to control conduct or acts for which it is not liable in the first place? * * * If the conduct resulting in plaintiff's injuries was outside the scope of Stalac's employment so that the railroad is not responsible for it, we cannot see how there could be any breach of duty or negligence in failing to guard against it or in neglecting to control him" (R. 514-515).

Thereafter on the 26th day of December, 1941, petitioner filed a motion for rehearing together with a brief in support thereof which was overruled on the 13th day of March, 1942. Petitioner has therefore exhausted all remedies available, save and except this writ of certiorari (R. 516-566).

By this decision of the Supreme Court of Missouri, petitioner, an employee of an interstate railroad corporation, has been denied the benefits provided for him under the Federal Employers' Liability Act. If this decision is the law under the Federal Employers' Liability Act, then a railroad company may be guilty of the grossest negligence in selecting, controlling and retaining dangerous employees without an employee injured thereby having any right of recovery for such negligence. If this decision is the law in cases under the Federal Employers' Liability Act, there can never be any recovery under such act where a railroad assumes a duty to its employees and then negligently breaches such duty. The present decision is contrary to the letter, the spirit, and express purpose of the Federal Employers' Liability Act in that it denies a recovery under the Federal Employers' Liability Act where a recovery would be permitted under the common law and even under the State Workmen's Compensation Law. It even denies recovery under the Federal Employers' Liability Act for violation of a duty voluntarily assumed toward employees, and regarded as necessary, although a recovery may be had under the common law for a violation of such duty. Being under the Federal Act, it is exclusive.

II.

BASIS OF JURISDICTION.

Petitioner, in support of the jurisdiction of this Court to review the within cause on writ of certiorari, respectfully states:

(a)

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code Annotated, Title 28, Section 344), which provides in part as follows: (Section 344b)

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

(b)

Federal Statute Under Which Rights Are Claimed.

The judgment of the Supreme Court of Missouri determined rights claimed by petitioner under the Federal Employers' Liability Act as amended, effective as of August 11, 1939. 53 Stat. 1404 (Title 45 U. S. C. A., Sec. 51, *et seq.*).

(c)

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered by Division Two on December 16, 1941 (R. 509). Motion For Rehearing With Suggestions In Support Thereof was duly filed on December 26, 1941 (R. 516). On March 13, 1942, the motion for rehearing was denied (R. 566) and the judgment then became final.

(d)

Nature of Case and Ruling Below.

Suit was brought under the Federal Employers' Liability Act, 53 Stat. 1404 (45 U. S. C. A., Sec. 51, *et seq.*) as amended, effective August 11, 1939, and there was no issue as to petitioner's rights being governed by the Act (opinion of Mo. Sup. Ct. 510-516).

The uncontradicted evidence showed that petitioner, a switchman who had just come in on an interstate movement, was standing in the freight house waiting to get a drink while waiting for the doors to be closed on an interstate movement he was to go out on (R. 21, 22, 29, 31, 39). One Stalac, a messenger employed by respondents who was going through the freight house carrying papers, walked up behind him and without warning seized him around the neck and shoulders so as to cut off his wind, held him until he became unconscious, and then released him so that he fell to the concrete floor striking his head and fracturing his skull. One Finnell, a patrolman in the company police, charged with preserving order on the premises, and preventing such unauthorized and unlawful conduct, was within three to five feet of petitioner as Stalac came up and while the attack took place and yet did nothing to warn petitioner

or to prevent the assault or the injuries although he had time to do so (R. 24-27, 33, 43, 44, 49, 68, 69).

The uncontradicted evidence showed that Stalac during the period of some five years that he had been employed by the respondents, had habitually engaged in rough and unsafe horseplay with various employees on the premises with the respondents' knowledge (opinion of Mo. Sup. Ct. R. 510).

Plaintiff pleaded and submitted two theories of recovery: The first being that respondents were negligent in retaining in their employ the servant Stalac, who to their knowledge, was in the habit of misconducting himself on respondents' premises in a manner that was dangerous to other employees, including plaintiff (R. 2-6, 295-297).

The Supreme Court of Missouri conceded that the conduct thus complained of constituted negligence under the common law and that the Federal Courts might recognize such conduct as negligent. The Court, however, held that there could be no liability under the Federal Employers' Liability Act for the negligence of respondents in retaining Stalac because "The Supreme Court of the United States, up to the present at least, has refused to impose liability on employers for acts of employees when outside the scope of their employment and not in furtherance of their employer's business" (R. 510-512). This completely overlooked the fact that petitioner *did not seek recovery on the theory that the specific act of Stalac was the act of the company* but on the theory that the *act of Stalac's superiors* in retaining him with knowledge of his dangerous propensities *was negligence on the part of the company* which directly resulted in the occurrence and injuries in question.

Petitioner's second theory of liability was that the company, by forming the Special Service Department and charging it with the duty of policing the conduct of employees and protecting them from unlawful violence, had regarded it as necessary and assumed a duty, a failure to perform which was negligence, irrespective of any negligence in retaining Stalac; that the company through its special agent Finnell had failed to act to prevent the injury and perform the duty thus assumed by the company (R. 2-6, opinion of Mo. Sup. Ct. R. 514-515). The Supreme Court of Missouri held that since the company was not liable for the act of Stalac under the first theory, it necessarily followed that there could be no duty to guard against or prohibit such acts by him; that even though Finnell knew of Stalac's propensities, liability could not be predicated on a failure to control the acts complained of unless the view was adopted that the master was liable for the tortious acts of his employees acting outside the scope of their employment; that if the railroad was not responsible for Stalac's act on the theory of respondeat superior, it could not breach any duty in failing to guard against it (R. 514-515).

(e)

Cases Believed To Sustain Jurisdiction.

The action of the Supreme Court in this case is, so far as we have been able to determine, without precedent, either in this state or in other states. However, it is clear that no one entitled to the benefits of the Federal Employers' Liability Act can be deprived thereof by a decision which is not reviewable by this court. The following decisions sustain petitioner's assertion of jurisdiction in this Court:

Brady v. *Terminal Railroad Association*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614.

Toledo Railroad Company v. *Slavin*, 236 U. S. 454, 35 S. Ct. 306, 59 L. Ed. 671.

Chicago Railroad Company v. *Devine*, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140.

Seaboard Airline Railroad Company v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

Finality of State Court Decree.

Although the Constitution of Missouri provides for certain instances in which the losing party may apply for a transfer to the court en banc, the present case was not of the type contemplated by the Constitution as interpreted by the Supreme Court of Missouri, and the opinion of the Division became the final opinion of the Court. Section 1 of the Amendment of 1890 to Article 6 of the Constitution of the state of Missouri creates two Divisions of that Supreme Court. Section 4 of that Amendment provides for certain instances where a case shall be transferred to the court en banc. The Amendment provides: "when the Judges of a Division are equally divided in opinion in a cause, or when a Judge of a Division dissents from the opinion therein, or when a federal question is involved, the cause on the application of the losing party, *shall* be transferred to the Court for its decision, * * *." It will be noted that an application for transfer is not a matter of judicial discretion but a matter of right in certain specified instances.

In *McFadden, et al.* v. *Catron*, 138 Mo. 197, 39 S. W. 771, the Supreme Court of Missouri held that unless the case falls within the class named in Section 4 of the Constitutional Amendment of 1890, *the losing party has no right to apply for transfer to the court en banc.*

In *State* v. *Duestrow*, 137 Mo. 44, 39 S. W. 266, the Supreme Court of Missouri held that the court en banc has no superintending control over the Divisions thereof,

and further held "in each case the judgment of a Division is the judgment of a court of last resort, and ends the matter decided."

The Supreme Court of Missouri has interpreted the words "federal question" as used in the above Constitutional Amendment, and petitioner and this Court are bound by its construction. Under the decisions of the Missouri Supreme Court, the interpretation of the Federal Employers' Liability Act is not "a federal question".

In *McAllister* v. *St. Louis Merchants Bridge Terminal Railway Company,* 324 Mo. 1005, 25 S. W. (2d) 791, an action under the Federal Employers' Liability Act was involved. The losing party filed a motion to transfer the cause to the court en banc on the ground that a federal question was involved under Section 4 of the Amendment of 1890 of Article 6 of the Constitution of Missouri. The Court held that the construction to be given the Constitutional Amendment was different from that ordinarily given the term "federal question". That if the term had been used,

> "without synonymous or qualifying terms in article 6 of the Constitution as originally adopted, it might be given this broad interpretation. However, appearing as it does in an amendment to article 6, and adopted some fifteen years thereafter, we think the words 'when a federal question is involved' should be interpreted according to the standard originally indicated and still set forth in article 6. Section 12 of that article fixes our jurisdiction, and the only federal questions there mentioned are those 'involving the construction of the Constitution of the United States,' or where 'the validity of a treaty or statute of or authority exercised under the United States is drawn in question.' When the article was amended as above, it seems reasonable to assume that the same kind of a federal question was meant as had previous-

ly been defined in the article, and such as is in itself jurisdictional rather than merely incidental to a cause of action brought here on other jurisdictional grounds.

The only federal question in this case grows out of the fact that the alleged cause of action rests on the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59). Neither the validity of the act nor 'authority exercised under the United States' is drawn in question. It follows that the motion should be, and the same is hereby, overruled."

The above opinion was followed and reaffirmed in *Barry* v. *Frisco Ry. Co.*, 324 Mo. 775, 26 S. W. (2d) 988, and *Riley* v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 142.

This Court has held that it is bound to accept the decision of the Missouri courts upon the construction of the Missouri constitutional provision.

In *Waggoner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 43 Sup. Ct. 589, 591, this Court, in discussing said Section 4 of the Amendment of 1890 to Article 6 of the Constitution of Missouri said:

"The question of the right to transfer was a question of Missouri law, upon which we are bound to accept the decision of the Missouri courts."

This Court in other decisions has recognized the distinction between the jurisdiction of the Supreme Court of Missouri under its constitution and the supervising powers of this Court, in regard to "Federal Questions".

Wabash Railroad Co. v. *Pearce*, 192 U. S. 179, 24 S. Ct. 231.

M., K. & T. Ry. Co. v. *Elliott*, 184 U. S. 530, 22 S. Ct. 446.

Since the right to apply for a transfer to the court en banc is one of right and not of discretion in certain

specific instances, and since this case did not fall within the designated class under the decisions of the Supreme Court of Missouri the decision of Division 2 of the Court was final and "ends the matter decided", *supra*, and petitioner had exhausted all his remedies in the Supreme Court of Missouri.

III.

QUESTIONS PRESENTED.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act as amended, effective August 11, 1939, 45 U. S. C. A., 53 Stat. 1404, *et seq*:

(1) Can an employee of an interstate carrier who is engaged in interstate commerce and whose exclusive remedy for personal injuries is under the Federal Employers' Liability Act be denied a recovery under such Act where the evidence shows that the carrier was guilty of negligence in retaining in its employ a known, habitually dangerous and incompetent employee on the sole ground that the act of the employee causing the injury was outside the scope of his employment, when the negligence relied on as resulting in the injury is not that of the employee causing the injury, but is the negligence of the agents and servants of the railroad who retained him, knowing of his dangerous propensities?

(2) Is the Federal Employers' Liability Act broad enough to cover all negligence of which an employer may be guilty, or does it leave an employee without any remedy in certain cases of the employer's negligence?

(3) Can an employee of an interstate railroad engaged in interstate commerce be deprived of a recovery for serious and permanent personal injuries caused by the breaching of a duty to the employee which the employer railroad has considered necessary and voluntarily assumed?

(4) Can an employee of an interstate railroad be denied recovery for personal injuries under the Federal Employers' Liability Act, when the employer has retained in its service an employee whom it knows to be habitually dangerous to other employees on its premises, and especially when the railroad has, or has regarded it as necessary to assume and has assumed a duty to prevent and to protect employees against such danger, and has delegated such duty to a special department for such purpose, and when a representative of such department stands by and permits one employee to injure another without doing anything to prevent it, although he has the time and ability to do so?

(5) Regardless of the question of liability in negligently retaining an employee whom it knows to be dangerous to others, can an interstate carrier escape liability under the Federal Employers' Liability Act when it regards it as necessary to assume and does assume a duty to control conduct of employees on its premises outside the scope of their employment where such conduct is dangerous to others, where the evidence shows that an employee charged by it with such duty, negligently fails to perform such duty?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) Petitioner, as grounds for the granting of a writ of certiorari by this Court to the Supreme Court of Missouri in the above cause, respectfully states that the Supreme Court of Missouri has determined substantial rights of an employee arising under the Federal Employers' Liability Act in a manner not in accord with the applicable decisions of this Court, and has passed on a set of facts not heretofore determined by this Court in a manner that does violence to the construction of the Federal Employers' Liability Act as set out in the applicable decisions of this Court.

(2) The Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) provides that, "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole, or in part, from the negligence of *any* of the officers, agents or employees of such carriers * * *." The Act does not define negligence. Rights and obligations under it depend upon the applicable principles of the common law as interpreted and applied in federal courts. *Southern R. Co.* v. *Gray*, 211 U. S. 333, 36 S. C. R. 558, l. c. 561. This Court in *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. C. R. 440, has said:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically

> restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. * * * 'Negligence' is a word of broad significance and may not readily be defined with accuracy."

(3) It has been said by the courts and text writers that the language used in the Act is broad enough to cover *any* negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein. *DeAtley* v. *C. & O. Ry. Co.,* 201 Fed. 591; *McDuff* v. *Kurn,* (S. Ct. Ala.), 172 So. 886; *Smithson* v. *A. T. & S. F. Ry. Co.,* 174 Cal. 148, 162 Pac. 111, 113; *Crawford* v. *Davis,* 136 S. Car. 95, 134 S. E. 247, 251; *Morris* v. *M. P. Ry. Co.,* 107 Nebr. 788, 187 N. W. 130, 133; 39 C. J. 266; *Roberts, Federal Liability of Carriers,* p. 1545.

(4) The Supreme Court of the United States in *Minneapolis, etc. Ry. Co.* v. *Rock,* 279 U. S. 410, 49 S. C. R. 363, 365, has said that under the Federal Act,

> "The carriers owe a duty to their patrons *as well as to those engaged in the operation of their railroads* to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

(5) The Supreme Court of the United States in *Fletcher* v. *B. & P. Ry. Co.,* 168 U. S. 135, 18 S. C. R. 35, held that a railroad owed a duty to the public to so control the conduct of employees on its trains acting outside the scope of their employment as to prevent injury to others. The Supreme Court of West Virginia in *Griffin* v. *B. & O. Ry. Co.,* 122 S. E. 912, applied the principles of the Fletcher case to an action under the Federal Employers' Liability Act and held that a de-

murrer to the petition should have been overruled where it was alleged that an interstate employee was injured by the conduct of other employees outside the scope of their employment where such conduct could have been anticipated and controlled. The Supreme Court of Alabama in *McDuff* v. *Kurn,* 172 So. 886, had before it a petition where plaintiff claimed to have been injured by reason of defendant employing and retaining a dangerous servant. The Court held that the common law prescribed a duty upon the employer for retaining a servant with knowledge of his incompetency and that the federal act could cover such conduct because it was intended to cover any act of negligence.

(6) The Missouri court in its opinion concedes that under the common law liability attaches for "knowingly retaining in one's employment one who is dangerous to others by reason of his habit of misconducting himself in a manner dangerous to others" (R. 511). It concedes that, "the federal courts might recognize plaintiff's theory of liability and construe the conduct complained of as being negligent" (R. 512). Yet it holds that there can be no recovery herein because under its construction of the Federal Employers' Liability Act, the Act is not broad enough to cover such theory of negligence. This holding is absolutely contrary to decisions of this Court setting out the interpretation to be given the Act, and the term "negligence" under the Act, and the duty of a railroad under the Act to employ and retain only fit and competent servants.

(7) The Supreme Court of Missouri, by its opinion in the present case, has declared a principle which, if allowed to stand, will be dangerous and far reaching and will narrow the benefits to be derived under the Federal Employers' Liability Act and do violence to the con-

struction that is accorded it under the decisions of this Court. Under the decision of the Missouri Court, a substantial group of railway employees entitled to receive the benefits of the Act would be wholly without a remedy as the Act is exclusive.

(8) If the opinion in the present case is the law, it will open a field for numerous and widespread abuses. Railroads may employ and retain the lowest type of belligerent and pugnacious thugs with impunity. They may fill their ranks with employees whose conduct will intimidate and threaten serious permanent injury to other employees who are in the course of their duties. They may employ and retain the type of person who will be a constant threat to other employees as to physical violence, yet escape any responsibility for such conduct as long as such employees commit their assaults outside the scope of their employment. It is seldom that unlawful violence occurs within the scope of employment. Conscientious, hard working employees would have no recourse for the excesses committed by bullies outside the course of their employment and could be intimidated into quitting their jobs, as it would be virtually impossible to ever prove that an unlawful assault was authorized by the railroad or committed within the scope of employment.

(9) The holding of the Court that there can be no recovery for the failure of Finnell to act to avoid the assault when he had the means and ability to do so and knew of Stalac's dangerous propensities, is so vicious and far reaching in its effect as to nullify the purpose of Congress in passing the Federal Employers' Liability Act in a large group of cases. Respondents regarded it as necessary and assumed the duty of controlling and policing the conduct of employees and of protecting em-

ployees from unlawful violence by forming the Special Service Department. Finnell was one of the persons charged with performing the duties the company regarded as necessary and assumed, yet the Missouri court has held that no liability attaches for his failure to act on the sole ground that the specific act of Stalac was outside the scope of his duties. If this construction of the Act is permitted to remain the law, employees can expect no protection on the premises of the company under any circumstances for injuries which are not sustained by reason of conduct of employees in the scope of their employment. They would be left at the mercy of thugs, vicious fellow servants, or other dangers, even though the company had promised and assumed a duty of protecting them from such dangers and regarded such protection as necessary. Such holding is so vicious as to require this Court to exercise its superintending powers.

(10) Although petitioner recognizes that in these trying times of national emergency this Court is occupied with matters of grave national importance, petitioner believes that in such times it is more necessary than ever that railway employees whose lives and health are necessary to the national defense should be given the full protection which Congress intended to afford such employees by passing the Federal Employers' Liability Act in the first instance, and by amending it to extend and liberalize its scope in 1939. The Missouri appellate courts have recently displayed a tendency to stray away from the principles laid down by this Court in interpreting the Federal Employers' Liability Act, and such tendency should be checked by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under seal of this Court, directed to the Supreme Court of Missouri, commanding said

Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of Eugene W. Osment, Respondent vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants, No. 35575, to the end that this cause may be reviewed and determined by this Court, as provided for in the Statutes of the United States, and that the findings and rulings of said Supreme Court to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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Attorney for Petitioner.

TRUSTY, PUGH, GREEN & TRUSTY,
RAYMOND E. MARTIN,
Kansas City, Missouri,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri in Eugene W. Osment, Respondent, v. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants, is reported in 159 S. W. (2d) 666, (not yet officially reported).

II.

STATEMENT AS TO JURISDICTION.

The judgment of the Supreme Court of the State of Missouri determined rights claimed by the petitioner

under the Federal Employers' Liability Act as amended August 11, 1939. (45 U. S. C. A., Sec. 51; 53 Stat. 1404). Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344 and particularly Sec. 344B thereof).

A full statement of the statutes and decisions relied on as a basis of jurisdiction herein and the nature of the case are fully set out under the heading II in the Petition for Writ of Certiorari herein, and will not be repeated at this point.

III.

STATEMENT OF THE CASE.

Petitioner has made a statement of the case under the heading "I" in the Petition for Writ of Certiorari, and will not unduly prolong this brief by repeating it herein, but refers the Court to the statement therein made.

IV.

SPECIFICATIONS OF ERROR.

(1) The Court erred in holding that petitioner could not recover under the Federal Employers' Liability Act for the negligence of respondents in "knowingly retaining in its employ one who was dangerous to others by reason of habitually misconducting himself outside the scope of his employment in a manner dangerous to others", solely because the act of the employee causing the injury was outside the scope of his employment, even though the negligence of the company in retaining said employee placed petitioner in a position where it might reasonably be anticipated that harm would come to him.

(2) The Court erred in construeing the language used in the Federal Employers' Liability Act, "negligence

of any of the officers, agents or employees", as too restricted "to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein."

(3) The Court erred in failing to construe the word "negligence" as used in the Federal Employers' Liability Act, "liberally to fulfill the purposes for which it was enacted", so that, "the word may be read to include all the meanings given it by the courts".

(4) The Court erred in holding that the failure of the company policeman, or special officer, Finnell, to act to avoid petitioner's injuries created no basis of recovery even though he was charged with a duty of so acting and had the time and present means and ability to act to prevent the injury.

(5) The Court erred in holding that under the Federal Employers' Liability Act there could be no breach of duty or liability on the part of respondents for the failure of the special officer, Finnell, to act to prevent the injury to Osment, even though Finnell and the company knew that Stalac was "dangerous to others", solely because it held that under the Federal Act respondents were not liable for knowingly retaining in their service "one who was dangerous to others", by reason of acts on respondents' premises outside the scope of his employment.

(6) The Court erred in holding that under the Federal Employers' Liability Act there can be no recovery for the failure of a carrier to perform a duty to its employees which it considered necessary and voluntarily assumed and created a special department for such purpose.

SUMMARY OF ARGUMENT.

I.

The master is under a duty to exercise reasonable care not to employ or retain in its service servants known to misconduct themselves on its premises outside the scope of their employment in a manner dangerous to other employees, and is "negligent in knowingly retaining in its employ one who is dangerous to others by reason of his habit of misconducting himself in a manner dangerous to others". Such liability is not based upon the scope of employment of the servant causing the injury nor of the specific act of such employee, but on the failure of his employer to exercise reasonable care in retaining him where it could reasonably anticipate danger to other employees if he were retained. Such theory of liability should be applied for such conduct of such employer to cases under the Federal Employers' Liability Act because under such act there is a duty to employ and retain only fit and competent servants. The term "negligence" in the Act is to be liberally construed to include all the meanings given the word negligence by courts. The language of the Act is, "negligence of any officers, agents, or employees", and this is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein, and petitioner was in the scope of persons intended to be protected by the Act.

Restatement of the Law, Torts, Section 317.

Ruling Case Law, Vol. 4, Sec. 650.

Sherman and Redfield on Negligence, Revised Edition, Vol. 1 Sec. 160 page 361 and Vol. 2, Sec. 199, pages 456-459.

Dean v. *St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54.

Zabawa v. *Oberbeck,* 146 Wisc. 621, 131 N. W. 826.

Barrentine v. *Henry Wrape Co.,* 105 Ark. 485, 152 S. W. 158.

Henry Wrape Co. v. *Barrentine,* 138 Ark. 267, 211 S. W. 366.

M., K. & T. Ry. Co. v. *Day,* 104 Tex. 237, 136 S. W. 435.

Waldo v. *Galveston, etc. Co.,* (Tex.), 50 S. W. (2d) 274.

Galveston, etc. Ry. Co. v. *Waldo,* (Tex.), 77 S. W. (2d) 326.

Swinanton v. *LeBoutiler,* 28 N. Y. 553, 148 N. Y. 752.

Neustiehl v. *Freedman,* 153 N. Y. S. 120.

Blaisdell v. *L. I. Ry. Co.,* 136 N. Y. S. 760.

Davis v. *Merrill,* 133 Va. 69, 112 S. E. 628.

Yazoo and Midland Valley R. Co. v. *Hare,* 104 Miss. 564, 61 So. 648.

Hagel v. *H. H. Franklin Co.,* 199 N. Y. 388, 92 N. E. 794.

Palmer v. *Keene,* 80 N. H. 68, 112 Atl. 798.

Rofsky v. *City,* 12 N. Y. S. (2d) 560.

Isaacs v. *Smith,* (Mo. App.), 275 S. W. 555.

Allen v. *Quercus Lumber Co.,* 171 Mo. App. 492, 157 S. W. 661.

Williams v. *M. P. R. Co.,* 109 Mo. 475, 18 S. W. 1098.

Fletcher v. *B. & P. R. Co.,* 168 U. S. 135, 18 S. C. R. 35, l. c. 37.

Blain v. *Hattig, etc. Co.,* 232 Mo. App. 870, 105 S. W. (2d) 946.

Stuart v. *K. C.,* 102 Kan. 307.

White v. *K. C. Stock Yards,* 104 Kan. 90.

Federal Employers' Liability Act, Title 45 U. S. C. A., Sec. 51, 53 Stat. 1404.

Jamison v. *Encarnacion*, 281 U. S. 635, 50 Sup. Ct. 440.

B. & P. R. Co. v. *Jones*, 95 U. S. 439, l. c. 441, 442.

Charnock v. *T. & P. Ry. Co.*, 194 U. S. 432, 24 Sup. Ct. 671, l. c. 672.

Lloyd v. *Alton R. Co.*, (Mo.), 159 S. W. (2d) 267.

DeAtley v. *C. & O. Ry. Co.*, 201 Fed. 591.

McDuff v. *Kurn*, (Ala.), 172 So. 886.

Smithson v. *A. T. & S. F. Ry. Co.*, 174 Cal. 148, 162 Pac. 111, 113.

Crawford v. *Davis*, 136 S. C. 95, 134 S. E. 247, 251.

Morris v. *M. P. Ry. Co.*, 107 Neb. 788, 187 N. W. 130.

Corpus Juris, Vol. 39, page 266.

Roberts, Federal Liability of Carriers, page 1545.

Minn., etc. Ry. Co. v. *Rock*, 279 U. S. 410, 49 Sup. Ct. 363, 365.

Griffin v. *B. & O. R. Co.*, 96 W. Va. 302, 122 S. E. 912.

II.

The respondents had a common law duty not to retain employees dangerous to others and to so control their servants acting outside the scope of their employment as to prevent an unreasonable risk of bodily harm to other servants engaged in their duties for respondents. Finnell was a patrolman engaged in the course of his duties for the Special Service Department and charged with the duty of controlling the conduct of servants and protecting them from injury or unreasonable risk of injury through the misconduct of other servants. He was within 2 to 5 feet of petitioner at the time Stalac walked up behind petitioner and seized him and Finnell had time and

the means and ability to prevent the seizure or the injury, and yet failed to act and such failure constitutes negligence for which the company is liable.

Regardless of any common law duty to retain only competent servants or to control their conduct, respondents considered it necessary and had assumed such duty by organizing the Special Service Department and placing upon it the duties of controlling the conduct of its servants and protecting its servants from bodily injury through any unlawful or excessive violence on the part of other employees. Finnell was a special officer charged with performing the duties thus assumed and his failure to prevent the seizure and injury to petitioner when he was present with the means and ability to do so constitutes negligence.

Sherman and Redfield on Negligence, Vol. 1, Sec. 8.

Lambert v. *Jones*, (Mo.), 98 S. W. (2d) 752, l. c. 756.

Barber v. *Kellogg*, 339 Mo. 677, 123 S. W. (2d) 100.

Frisco v. *Mills*, 271 U. S. 344, 46 Sup. Ct. 520.

Washington T. Co. v. *Callahan*, 276 F. 334.

Matthison v. *Payne*, 98 N. J. Law 87, 118 Atl. 771.

Tapore v. *Boston M. R. Co.*, 78 N. H. 536.

Brock v. *Mobile R. Co.*, 336 Mo. 918, 51 S. W. (2d) 100, Cert. Den. 53 Sup. Ct. 87, 287 U. S. 638.

Thom v. *N. Pac. R. R. Co.*, 190 Minn. 622, 252 N. W. 660.

Ross v. *L. & N. R. Co.*, 178 Miss. 69, 172 So. 752.

Seaboard Airline Ry. Co. v. *Latham*, 23 Ala. App. 490, 127 So. 679.

Simmons v. *Louisiana Railroad Co.*, 149 La. 686, 90 So. 24.

Stool v. *Southern Pacific,* 88 Or. 350, 172 Pac. 101.

Newkirk v. *Pryor,* (K. C. App.), 183 S. W. 682.

Evans v. *Santa Fe,* 345 Mo. 147, 131 S. W. (2d) 604.

Jenkins v. *Kurn,* 313 U. S. 256, 85 L. Ed. 851.

VI.

ARGUMENT.

I.

Negligence in Retaining Stalac.

Under the common law, "a master is under a duty to exercise reasonable care to so control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them", where the servant, "is upon the master's premises or upon premises which the servant is privileged to enter only as a servant", and the master, "knows or has reason to know, of the necessity and opportunity for exercising such control." "The master may subject himself to liability * * * by retaining in his employment servants, who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others * * *."

This statement of a master's duty is clearly and succinctly set out in Restatement of the Law, Torts, Section 317. See also 4 R. C. L., Section 650; Sherman and Redfield on Negligence, Revised Edition, Vol. 1, Section 160, page 361 and Vol. 2, Section 199, pages 456-459. The rule thus stated has been applied by the courts on numerous occasions. *Dean* v. *St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54; *Zabawa* v. *Overbeck*, 146 Wisc. 621, 131 N. W. 826; *Barrentine* v. *Henry Wrape Co.*, 105 Ark. 485, 152 S. W. 158; *Henry Wrape Co.* v. *Barrentine*, 138 Ark. 267, 211 S. W. 366; *M., K. & T. Ry. Co.* v. *Day*, 104 Tex. 237, 136 S. W. 435; *Waldo* v.

Galveston, etc. Co., (Tex.), 50 S. W. (2d) 274; *Galveston, etc. Ry. Co.* v. *Waldo*, (Tex.), 77 S. W. (2d) 326; *Swinanton* v. *LeBoutiler*, 28 N. Y. 553, 148 N. Y. 752; *Nenstiehl* v. *Freedman*, 153 N. Y. S. 120; *Blaisdell* v. *L. I. Ry. Co.*, 136 N. Y. S. 760; *Davis* v. *Merrill*, 173 Va. 69, 112 S. E. 628; *Yazoo and Midland Valley R. Co.* v. *Hare*, 104 Miss. 564, 61 So. 648; *Hagel* v. *H. H. Franklin Co.*, 199 N. Y. 388, 92 N. E. 794; *Palmer* v. *Keene*, 80 N. H. 68, 112 Atl. 798; *Rofsky* v. *City*, 12 N. Y. S. (2d) 560; *Isaacs* v. *Smith*, (Mo. App.), 275 S. W. 555; *Allen* v. *Quercus Lumber Co.*, 171 Mo. App. 492, 157 S. W. 661; *Williams* v. *M. P. R. Co.*, 109 Mo. 475, 18 S. W. 1098.

The Missouri court in its opinion concedes that this is the law, and concedes that the facts within the present case are sufficient to make a case under the rule therein propounded.

The Missouri court in its opinion concedes that "The federal courts might recognize the plaintiff's theory of liability and construe the conduct complained of as being negligence * * *" (R. 512). The federal courts not only "might" construe the conduct complained of as being negligence, but in the case of *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135, 18 S. C. R. 35, this Court adopts the rule herein set out as to the liability of a railroad to third persons for the unauthorized conduct of employees riding upon its trains. In so holding, the Court said, l. c. 37:

> "*It is not a question of scope of employment, or that the act of the individual is performed by one who has ceased, for the time being, to be in the employment of the company.* The question is, does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act

which might reasonably be called dangerous, and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented? *We think the company does owe such a duty, and if, through and in consequence of its neglect of that duty, an act is performed by a passenger or employee which is one of a series of the same kind of acts, and which the company had knowledge of, and had acquiesced in, and if the act be, in its nature, a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable.*" (Italics ours).

It goes without argument that the injury to Osment could have been reasonably anticipated, and could have been prevented merely by not keeping Stalac in the service.

It is clear from the above quotation that this Court recognizes the liability of a master for failing to prevent or control unauthorized conduct of his servant outside the scope of his employment where the employer could reasonably foresee or anticipate the danger.

Had the petitioner been under the state Workmen's Compensation Law he would have been entitled to recover even though Stalac's act was outside the scope of his employment. The courts hold that "If an employee whose predilection for playing pranks, which are likely to result in injury to his fellow employee, is knowingly kept in the employ of the master, the danger of injury becomes an incident of the employment and the injured employee may recover under the Workmen's Compensation Law." *Blain* v. *Huttig, etc. Co.*, 232 Mo. App. 870, 105 S. W. (2d) 946; *Stuart* v. *K. C.*, 102 Kan. 307; *White* v. *K. C. Stock Yards*, 104 Kan. 90. The Federal Act, like State compensation acts, is to be liberally construed.

The Missouri court concedes that the petitioner would be entitled to recover at common law. He would have been entitled to recover under the decisions of this Court had he been an invitee or one lawfully on the premises. He would have been entitled to recover had he been under the Workmen's Compensation Act. *The sole reason he was denied recovery was because he was under the Federal Act which was his exclusive remedy.* The Missouri court denies recovery under such act solely because it says that this Court, "Has refused to impose liability on employees for acts of employees when outside the scope of their employment." This holding ignores the fact that petitioner did not seek to hold respondents on the theory that the specific act of Stalac was their act.

The opinions liken the theory of liability for retaining a dangerous employee to liability in harboring a vicious dog or other animal or maintaining a pitfall. In *Dean* v. *St. Paul Union Depot Co.*, 41 Minn. 360, 43 N. W. 54, l. c. 55, the Court says: "It (defendant) had no more right therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building a dangerous and vicious man, than it would have to keep and harbor a dangerous and savage dog or other animal, or to permit a pitfall or trap * * *." This is in accord with, Restatement of the Law, Torts, Sec. 317, and other authorities, *supra.*

The pertinent parts of the Federal Employers' Liability Act, Title 45, U. S. C. A., Sec. 51, 53 Stat. 1404, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of

any of the officers, agents or employees of such carrier * * *."

It will be noted that the act used the words "negligence of *any* of the officers, agents or employees of such carrier." It does not restrict it to a fellow servant or an officer, agent or employee personally inflicting the injury. The term "negligence" is not defined. Leading opinions of this Court have set out the construction to be given the word, however. This Court in *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, has said:

> "The act is not to be narrowed by refined reasoning or for the sake of giving negligence a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to the end that *the word may be read to include all the meanings given to it by courts* and within the word as ordinarily used * * * negligence is a word of broad significance and may not readily be defined with accuracy." (Italics ours).

The liberality of the purpose of the Act is further shown by the Amendment of 1939.

Negligence under such Act was defined by the Supreme Court of the United States in *B. & P. R. R. Co.* v. *Jones*, 95 U. S. 439, as follows, l. c. 441, 442:

> "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what a person under the existing circumstances would not have done. *The essence of the fault may lie in omission or commission.* The duty is dictated and measured by the exigencies of the case." (Italics ours).

In *Charnock* v. *T. & P. Ry. Co.*, 194 U. S. 432, 24 Sup. Ct. 671, the Supreme Court defines negligence under the federal act as follows, l. c. 672:

> "Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances."

In *Lloyd* v. *Alton R. Co.*, (Mo.), 159 S. W. (2d) 267, an action under the Federal Employers' Liability Act, the Missouri court has set out a remarkable definition of negligence under the act:

> " 'If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure so to do is negligence. That the danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care. One who crosses a railroad track may not reasonably anticipate that a train will in fact be met, but, by reason of the risk that one may be, he is called upon to do what is reasonably required to find out. * * * While "the likelihood or unlikelihood of a future happening is the turning point" as the test of duty to anticipate * * *, this does not mean that the chances in favor of the happening must exceed those against it. The test is not of the balance of probability, *but of the existence of some probability of sufficient moment to induce action to avoid it on the part of the reasonable mind.* * * * If there was likelihood of injury, the duty to use care was not discharged merely because there was greater unlikelihood of it.' *Tullgren* v. *Amoskeag Mfg. Co.*, 82 N. H. 268, 276, 277, 133 A. 4, 8, 9, 46 A. L. R. 380." (Italics ours).

Courts and text writers is construing the Act have said, "The language used is 'any officers, agents or employees' *and this is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein.*" *DeAtley* v. *C. & O. Ry. Co.*, 201 Fed. 591; *McDuff* v. *Kurn*, (Ala.), 172 So. 886; *Smithson* v. *A. T. & S. F. Ry. Co.*, 174 Cal. 148, 162 Pac. 111, 113; *Crawford* v. *Davis* 136 S.

C. 95, 134 S. E. 247, 251; *Morris* v. *M. P. Ry. Co.*, 107 Neb. 788, 187 N. W. 130; 39 C. J. 266; Roberts, Federal Liability of Carriers, page 1545.

When the tests of negligence set out in the cases under the Federal Employers' Liability Act are applied to the facts in the present case, there is no sound legal or factual basis for the opinion of the Supreme Court of Missouri. Where the respondents knew that Stalac was accustomed to engage in rough and dangerous horseplay with other employees on the premises of the company, there was surely "Some probability of harm sufficiently serious that ordinary men would take precautions to avoid it", even though the chances of Osment being injured by Stalac in the specific manner at the particular time might not exceed the chances that he would not be so injured. Since negligence always has relation to what an ordinarily prudent man would do or omit to do under a given set of circumstances, it necessarily follows that the jury could find that an ordinarily prudent employer under the circumstances in evidence would not have permitted Stalac to run at large on its premises, thereby placing employees, including plaintiff, in a position where it might reasonably be anticipated harm would come to them or to him.

In view of the construction given the language of the Act by this Court, it is obvious that the duty and breach thereof claimed herein should form a basis of recovery under the Act. However, this Court has gone farther and specifically held that under the Act "The carriers owe a duty to their patrons *as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service.*" *Minn., etc. Ry. Co.* v. *Rock*, 279 U. S. 410, 49 S. Ct. 365.

The identical question herein involved was before the Supreme Court of West Virginia in *Griffin* v. *B. & O. R. Co.*, 96 W. Va. 302, 122 S. E. 912, an action under the Federal Employers' Liability Act. Plaintiff appealed from an order of the trial court sustaining a demurrer to the petition. It was alleged that plaintiff, a track man, was injured by a stone thrown by a co-employee; that such conduct was customary and that defendant acquiesced therein. It was defendant's contention that there could be no liability, because the stone was not thrown in the scope of the employment. The Court held that the defendant was not liable because of the negligence of a fellow servant of the plaintiff, *but because of the negligence of the company in placing the plaintiff in a position where it might reasonably be anticipated that harm would come to him by reason of dangerous practices permitted.*

The defendant sought to restrict the principle expounded by this Court in *Fletcher* v. *B. & O. Ry. Co.*, 168 U. S. 135, 18 S. Ct. 35, supra, to persons on streets or on adjacent private property injured by the conduct of an employee outside the scope of his employment and acquiesced in by the company. In answer to this, the West Virginia court said:

> "If the railroad company is liable to one on private property for its negligent acts, why would it not be liable to one lawfully and rightfully on its own premises, when injured by such act?"

It was likewise argued that this negligence was not that contemplated under the Federal Act, but the Court said, "Undoubtedly the plaintiff in this case comes within the scope of persons intended to be protected by the Act."

The Missouri Court has based its holding solely on *Davis* v. *Green*, 260 U. S. 349, 43 Sup. Ct. 123, and some

decisions by state courts. Since it is conceded in the opinion that the common law of Missouri would give plaintiff a right of recovery herein, recovery can only be denied because of a contrary holding on the same facts by this Court. In this case the only opinion which could be controlling would be that of *Davis* v. *Green*, *supra*.

We sincerely believe that the Missouri Court has misconstrued the opinion in *Davis* v. *Green*, 260 U. S. 349, 43 Sup. Ct. 123. A careful analysis of the state court opinion, as well as the opinion of the Supreme Court, is necessary to a clear understanding of the case. The action originated in one of the circuit courts in Mississippi and went on appeal to the Supreme Court of Mississippi where it is reported as *Hines* v. *Green*, 87 So. 649. The state court in its opinion took the position that there could be no recovery under the theory presented by the plaintiff unless the servant committing the assault *was engaged in the scope of his employment at the time* and the case in the State Supreme Court was decided on the theory that the assault was so committed, the Court holding, l. c. 652:

> "So far as the question as to whether the two men were engaged in the master's business, about the master's business, and whether the quarrel occurred and the killing resulted from this relation the evidence amply sustains the plaintiff's contentions as to liability on this feature of the case."

This was the only question considered and directly passed upon by the state court, except the question of assumption of risk. The only question then before this Court when the case came there on certiorari under the style of Davis vs. Green was whether the evidence supported the theory that both parties were engaged in the master's business at the time of the assault. There was no other question presented for the consideration of the

Supreme Court. Recovery was bottomed not on the conduct of the agents and the servants of the company *in retaining the man committing the assault, but upon the conduct of the man himself allegedly in the course of his master's business.* The only thing this Court decided was that the evidence did not sustain the holding of the state court that the killing was done in the course of employment. This Court *was not called upon in any way to pass upon the question of whether he had been negligently retained, regardless of whether the killing occurred in the course of the employment.*

In *Dewing* v. *N. Y. C. Ry. Co.*, 281 Mass. 351, 183 N. E. 754, plaintiff sued in two counts, the first at common law and the second under the Federal Employers' Liability Act. He waived the second count and the only holding the Court made was that since the evidence showed that plaintiff was under the Federal Employers' Liability Act, he could not recover at common law under the remaining count of his petition.

In *Bocian* v. *Union Pacific R. Co.*, 137 Nebr. 318, 289 S. W. 372, plaintiff's petition alleged that the assault causing his injuries was committed within the scope of employment of the man committing the assault. The case was ruled on a failure of the evidence to support the allegation that the assault was within the scope of employment. The same situation existed in *Jackson* v. *Chicago, etc., Ry. Co.*, 178 Fed. 432. The case of *Griffin* v. *B. & O. Ry. Co.*, 126 S. E. 571, was a second appeal in the case of *Griffin* v. *B. & O. Ry. Co.*, 122 S. E. 912, and supports plaintiff's theory of recovery herein.

II.

Negligence of Finnell.

Respondents considered it necessary to and did organize the Special Service Department and placed upon

it the duty of preserving order upon the premises, controlling the conduct of its servants, and protecting servants from unlawful violence and injuries. This department extended over its entire system. Its duties were not restricted to any one employee or any particular group of employees. Finnell, at the time of petitioner's injuries, was a patrolman in the Special Service Department engaged in the course of his duties. In performing them he was not restricted to employees under him, as is a foreman of a particular department, but had police power over all of the personnel of respondents' railroad (R. 13, 14, 17-19, 289, 290).

The evidence showed that when the seizure took place, Finnell was within two or three feet of the parties, knew Stalac's propensities, had warned him about them prior to the occasion in question, saw Stalac come directly up behind Osment although he had no business doing so and could have gone around him, saw him reach his arm around Osment's neck, place the hand on Osment's other shoulder for a better purchase and squeeze Osment's wind pipe or Adam's apple so that his air was cut off. (It was about 30 to 40 seconds from the time Osment was first gripped before he lost consciousness). When Osment became unconscious, Stalac released him and he went slowly to the floor on his knees and then fell over backwards, striking his head on the concrete floor (R. 21-27, 33, 36, 40-45, 49, 64, 68, 69, 46, 67, 91, 92, 94, 105, 106, 121). Finnell had the means, time and ability to first warn Osment, then to require Stalac to release his hold before Osment became unconscious, and to even later catch Osment before he struck his head, yet he did absolutely nothing. Respondents contend, and the Court held, that Finnell's failure to perform his duty under such circumstances imposed

no liability on respondents solely because Stalac was outside the scope of his employment under theory one.

Petitioner contends that, under the facts, respondents had a common law duty to control Stalac; that Finnell was one of the representatives charged with such duty, and also that his failure to act was negligence.

Recovery, under respondents' second theory, however, is not dependent upon the existence of the first theory, but they could be combined. Petitioner had a right to go to the jury on such theory even if the first theory, negligence in retaining and failing to control Stalac, were completely out of the case. Petitioner would have had a right of recovery under this theory even if there were no evidence of any prior conduct of Stalac or if such evidence were only in the case as bearing on Finnell's knowledge of what Stalac might likely do, and had no purpose in the case unless it would be to stimulate Finnell's reaction when Osment was seized. It is not based on a failure to have someone guard against what Stalac might likely do. It is based upon Finnell's failure to act in the performance of a duty considered necessary as to all employees and assumed by the master and directly enjoined upon Finnell.

The defendant, through the permanent Special Service Department represented by Finnell, had considered necessary and created and assumed a general continuing duty to its employees not based upon a specific occurrence such as dangers arising from a strike, and not based upon the danger created by a specific employee such as Stalac. This is further shown by the fact that Finnell and others in that department had actually remonstrated with Stalac and other employees about engaging in horseplay and had instructed them against it. It is a well established rule of law that a duty not owed

may be voluntarily assumed, but once having assumed a duty, failure to properly perform it is negligence.

It is said in Sherman and Redfield on Negligence, Vol. 1, Sec. 8:

> "A duty, not owed, may be voluntarily assumed. One who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."

In *Lambert* v. *Jones*, (Mo.), 98 S. W. (2d) 752, plaintiff sought to recover for failure to have light on a stairway. There was no common law duty to furnish light, yet it was shown that defendant assumed the lighting of the stairway. In passing on his failure to do so on the occasion in question, the Court said, l. c. 756:

> "By assuming this obligation, *which he apparently thought was necessary* when his dance hall was open to the public, *a duty was created* which he owed to the public to exercise ordinary care to keep his lights in good working order. *It was therefore his duty to see that they were turned on, at such times, so that the stairway would be lighted sufficiently to make it reasonably safe for the public to use it* on the occasions when he invited them to do so for the purpose of coming to his dance hall. *Failure to furnish sufficient light on such occasions would be negligence because such a failure would be 'an unperformed duty'* owing to his invitees." (Italics ours).

See also *Barber* v. *Kellogg*, 339 Mo. 677, 123 S. W. (2d) 100; *Frisco* v. *Mills*, 271 U. S. 344, 46 S. Ct. 520. A railroad company may assume a duty by rule or custom, and a violation thereof constitutes negligence under the federal act. *Washington T. Co.* v. *Callahan*, 276 F. 334; *Matthison* v. *Payne*, 98 N. J. Law 87, 118 Atl. 771; *Tapore* v. *Boston M. R. Co.*, 78 N. H. 536; *Brock* v. *Mobile R. Co.*, 336 Mo. 918, 51 S. W. (2d) 100, Cert Den. 53 S. Ct. 87, 287 U. S. 638.

The Missouri Supreme Court does not hold that there may not be liability for failure to perform a duty voluntarily assumed, but denied recovery under the second theory on the ground that since there could be no liability for the act of Stalac committed outside the scope of his employment, there could therefore be no duty to guard against it or prohibit it even though Finnell and respondents knew of Stalac's propensities. The holding necessarily means that a duty to prevent an injury arises only when the injury itself is one for which the defendant would be liable (R. 514-516). In other words, there could be no recovery for a failure to prevent the injury unless Stalac had assaulted or threatened to assault Osment in the course of Stalac's employment. This holding would seem to be absurd in the light of the settled decisions. If this be the law, then Finnell could have stood by watching other employees throwing stones at trainmen as they passed on cars and could have remained inactive until a trainman was hit and injured, and still subject the company to no liability.

Or assume that Stalac stood outside of the freight house and throwed stones through the window for 40 seconds and Finnell stood by watching and did nothing and finally a stone hit Osment.

Or assume that a disturbance arose and one man was down and another sat on top of him slowly choking him to death, could it be said that Finnell performed his duties by watching one man kill another and do nothing about it?

Assume that Stalac had come up to Osment with a gun and stood threatening to shoot him, could Finnell be said to have performed his duties if he stood by with a realization of what was going on and had the time and ability to prevent a shooting and yet did nothing?

Assume that a pole belonging to another company had fallen on one of respondents' employees and was slowly crushing him to death. Would Finnell have no duty to act solely because the falling of the pole in the first instance was not the fault of the railroad?

It is the settled law under the Federal Employers' Liability Act that where one is charged with certain duties, his employer cannot escape liability for his failure to perform, because the danger which such employee was charged with preventing was caused by the negligence or criminal act of a third party, *Thom* v. *N. Pac. R. R. Co.*, 190 Minn. 622, 252 N. W. 660; *Ross* v. *L. & N. R. Co.*, 178 Miss. 69, 172 So. 752.

In *Seaboard Airline Ry. Co.* v. *Latham*, 23 Ala. App. 490, 127 So. 679, a section hand cutting weeds along the right-of-way struck a wasp's nest and was attacked by wasps causing him to drop a scythe and injure himself. The evidence showed that his foreman knew of the presence of the wasp's nest, yet failed to warn him of it. The Court affirmed a recovery under the Federal Employers' Liability Act for the foreman's failure to warn.

It is obvious that the wasps were not acting for and on behalf of the defedant railroad in attacking the section hand and that the railroad would not have been liable for their conduct, yet a recovery was permitted because the foreman, like others, knew the dangerous propensities of wasps.

Under the federal act, liability attaches for a failure to prevent injury to one employee where another employee has a duty and sees the likelihood of injury, and has the time and ability to avoid it. *Simmons* v. *Louisiana Railroad Co.*, 149 La. 686, 90 So. 24, *Stool* v. *Southern Pacific*, 88 Ore. 350, 172 Pac. 101; *Newkirk* v. *Pryor*, (K. C. App.),

183 S. W. 682; *Evans* v. *Santa Fe,* 345 Mo. 147, 131 S. W. (2d) 604; *Jenkins* v. *Kurn,* 313 U. S. 256, 85 L. Ed. 851.

The cases cited by the Missouri court in support of its holding do not cover situations in any wise similar to the one at bar. In *C. & O. Ry. Co.* v. *Mihas,* 280 U. S. 102, 50 Sup. Ct. 42, plaintiff was injured in a movement of cars and this Court denied recovery because those engaged in the movement had no knowledge of his position or his movements and there was no custom or duty to warn before making a movement which inured to his benefit. The case of *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64, 48 Sup. Ct. 25, denied recovery to the administrator of one employee shot by another employee. The case was ruled on the basis that the shooting could not have been anticipated and that those present had no opportunity to prevent it and had actually warned the deceased not to get near the man who did the shooting. In *St. L. San Francisco R. Co.* v. *Mills,* 271 U. S. 344, 46 Sup. Ct. 520, the company voluntarily furnished the deceased a guard to escort him home during a strike. There was no evidence that the guard was negligent in the performance of his duty. This Court held that recovery could not be based on a failure to furnish more than one guard since the duty was only assumed to that extent and there was a total failure of evidence to show that additional guards would have prevented the killing.

The petitioner respectfully submits that the holding in the above entitled cause is contrary to the construction given the Federal Act by this Court and unduly restricts and narrows the benefits to be derived by employees under the Act, and is contrary to controlling legal principles announced by this Court, and is decided in a manner entirely different than this Court would decide it under the principles announced in its decisions.

WHEREFORE, petitioner respectfully urges that this Court grant a writ of certiorari to the Supreme Court of Missouri and review and reverse the holding and decision of that court.

Respectfully submitted,

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8

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 140.

EUGENE W. OSMENT, *Petitioner,*

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR.,
Receivers of the Wabash Railway Company,
a Corporation, *Respondents.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF OF THE RESPONDENTS IN OPPOSITION
and
EXHIBITS.

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INDEX

Opinion Below 1
Jurisdiction 2
Questions Presented 2
Statement 2
Summary of Argument 5

Argument—

I. This court does not have jurisdiction 6

II. Even if this court has jurisdiction the petition for a writ of certiorari should be denied 10

Conclusion 16

Appendix

EXHIBIT 1. Copy of opinion of Missouri Supreme Court en banc in Scheufler vs. Lumbermen's 17
EXHIBIT 2. Copy of record of Missouri Supreme Court on Motion to Transfer in King vs. K. C. Life Insurance Co. 20
EXHIBIT 3. Copy of record of Missouri Supreme Court on Motion to Transfer in Klotsch vs. Collier & Son 23

Table of Cases Cited

Andrews vs. Virginian Ry. Co., 248 U. S. 272 9
Atlantic Coast Line vs. Southwell, 275 U. S. 64 ..... 11, 15, 16
Davis vs. Green, 260 U. S. 349 ..... 10, 11, 15, 16
Fisher vs. Perkins (Carrico), 122 U. S. 522 ..... 9, 10
Fletcher vs. B. & P. R. Co., 168 U. S. 135 15
Gorman vs. Washington University, 86 L. Ed. 895 (decided April 27, 1942) 7, 9
Great Western Telegraph Co. vs. Burnham, 162 U. S. 339 9
King vs. K. C. Life Insurance Co. (see Exhibit 2) 8
Kirkland vs. Bixby, 282 Mo. 462 13
Klotsch vs. Collier & Son (see Exhibit 3) 8

McComb vs. Commissioners, 91 U. S. 1 9
McMaster vs. Gould, 276 U. S. 284 9
Martin vs. Wabash Ry. Co., 325 Mo. 1107 13
Matthews vs. Huwe, 269 U. S. 262 10
Mullen vs. Western Union Beef Co., 173 U. S. 116 9
Nivert vs. Wabash Railroad Co., 232 Mo. 626 13
Osment vs. Pitcairn et al., 159 S. W. 2d 666 1
St. Louis & S. F. Ry. vs. Mills, 271 U. S. 344 ..... 13, 15, 16
Scheufler vs. Manufacturers Lumbermens Underwriters, decided July 7, 1942, by Missouri Supreme Court en banc (Exhibit 1 attached) 7, 8
Southern Electric Co. vs. Stoddard, 269 U. S. 186 9
Stratton vs. Stratton, 239 U. S. 55 9
Troost Avenue Cemetery Co. vs. Kansas City et al., 154 S. W. 2d 90 8
Young vs. Hilmer, 154 S. W. 2d 87 8

Constitution, Statutes and Rules Cited

Sections 1 and 4 of the 1890 Amendment to Article VI of the Missouri Constitution 6
Section 237 (b) of the Judicial Code, 43 Stat. 937, U. S. C. A., Title 28, Secs. 344, 344 (b) 2, 6
Rule 24, Supreme Court of Missouri 7
53 Stat. 1404, U. S. C. A., Title 45, Sec. 51 et seq. 2

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 140.

EUGENE W. OSMENT, *Petitioner*,

vs.

NORMAN B. PITCAIRN and FRANK C. NICODEMUS, JR., Receivers of the Wabash Railway Company, a Corporation, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF OF THE RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court below (R. 510) is reported in 159 S. W. 2d 666 (Not yet officially reported)

JURISDICTION.

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by an act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937, U. S. C. A., Title 28, Sections 344 and 344 (b), to review a judgment of Division Two of the Supreme Court of Missouri rendered in an action brought under the Federal Employers' Liability Act as amended August 11th, 1939, Title 45, U. S. C. A., Sec. 51, 53 Stat. 1404.

QUESTIONS PRESENTED.

1. Has this Court jurisdiction to review the decision in question which was rendered by Division Two of the Supreme Court of Missouri which is not the highest court of the state, when a review of such decision by the Missouri Supreme Court *en banc*, the highest court, might have been had, and there was no attempt made to procure such review?

2. Even if this Court has jurisdiction should it exercise its discretionary power by certiorari to review the decision in question where such decision holds: that the master is not liable for an act of horseplay by his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment, and where liability is predicated on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act.

STATEMENT.

The judgment sought to be brought here by certiorari was rendered by Division Two of the Supreme Court of Missouri. No motion was made by petitioner to have the case transferred to the Missouri Supreme Court *en banc*.

This action was begun in the Circuit Court of Jackson County, Missouri, under the Federal Employers' Liability Act. The plaintiff, petitioner here, recovered judgment in the trial court which was reversed outright by Division Two of the Missouri Supreme Court. The evidence in the case was as follows—Petitioner Osment, a switchman in the employ of the respondents, was standing in respondent's freight house with Chamberlain and Gardner, two members of his switching crew, near a water fountain. Finnell, a patrolman in the Wabash Receiver's Special Service Department, was sitting near the fountain facing the switching crew and about four or five feet from Osment. Gardner was facing Osment (R. 50) and Chamberlain was standing at Osment's right side. While the men were in these positions, and within a few feet of each other, John Stalac, a young man in the messenger department of the Wabash receivers, came through the freight house. He had no business with Osment or Finnell or any member of Osment's switching crew (R. 33, 134). He came up behind Osment, and without indicating what he intended to do (R. 24), put his arm around Osment's shoulder and neck in such manner that Osment could not see who it was. and held it there for from ten to thirty or forty seconds, Osment slipped to the floor in a sitting position and then fell back, striking the back of his head on the concrete floor. He was unconscious for a few seconds and there was a small abrasion on the back of his head and a little blood (R. 49). Stalac took Osment over to the water cooler, washed off Osment's head and put some disinfectant on it. While doing this, Osment and Stalac were talking and laughing over the occurrence and were apparently friendly (R. 49, 50). The Wabash Receivers offered no evidence on the accident and all of the testimony on that phase of the case is that of Osment's witnesses Chamberlain, Gardner and Osment.

Stalac went to work for Respondents as a young boy; he was playful like a big pup, addicted to good natured

horseplay (R. 48). All of Osment's witnesses agree that when Stalac put his arm around Osment's shoulders, Osment did not struggle or cry out (R. 33, 50) and Chamberlain and Gardner, who were looking right at Osment, did not know that he was in any difficulty until he slipped to the floor (R. 33). Even then Gardner thought Osment was shamming (R. 45).

The amended petition (R. 2) after alleging that Stalac was employed by respondents as a messenger, and that Finnell was employed by respondents as a peace officer whose duty it was to protect the property of respondents and protect their employees, charged that Stalac suddenly and without cause or warning seized Osment from behind about his throat and neck in the presence of Finnell and injured Osment. The petition alleged three grounds of negligence: (1) that Stalac was an incompetent and dangerous man for respondents to have in their employ, to respondents' knowledge, and that respondents were negligent in retaining and continuing him in their employ, (2) that respondents owed Osment a duty to maintain a safe place to work and that the retention of Stalac in their employ, knowing his dangerous characteristics, was negligence and ratified his conduct and dangerous condition and approved his assault on Osment, and (3) that Finnell, who knew of Stalac's dangerous propensities, was employed by respondents to protect Osment and other employees from attacks, assaults, etc., and that Finnell who was present when Stalac assaulted Osment, permitted, ratified and allowed the dangerous seizure when with the means at hand and in time he could have stopped and prevented the seizure and have warned Osment of Stalac's presence and of the impending seizure in time to have prevented the same and have prevented the resultant injuries after the peril and seizure arose.

The first two allegations of negligence are based on the retention of Stalac, the third on Finnell's failure to act after Osment's peril was known by Finnell to be im-

minent. The third theory of recovery went out of the case on the court's refusal to give petitioner's Instruction 3 (R. 297).

The answer was a general denial.

SUMMARY OF ARGUMENT.

1. This Court does not have jurisdiction to review the decision in question because it was rendered by Division Two of the Supreme Court of Missouri and was not rendered by the highest court of that state in which a decision could be had.

2. Even if this Court has jurisdiction, the petition for certiorari should be denied because the decision of Division Two of the Missouri court, in holding that a master is not liable for an act of horseplay of his servant, who is known to be addicted to horseplay, when such act is outside the scope of his employment and where liability is claimed on the theory that retaining such servant in employment was negligence and on the theory that the master negligently failed to protect another servant from injury from such an act, is not contrary to but is in accord with the applicable decisions of this Court.

ARGUMENT.

I.

This Court Does Not Have Jurisdiction.

Section 237 (b) of the Judicial Code restricts the authority of this court to review decisions of state courts to those causes wherein judgment has been rendered "by the highest court of a state in which a decision could be had."

The judgment sought to be reviewed here was rendered by Division Two of the Supreme Court of Missouri. The losing party there (petitioner here) made no application to transfer the cause to the Missouri Supreme Court *en banc*, although the power of said Division Two to make such transfer on such application exists under the second clause of Section 4 of the 1890 Amendments to Article VI of the Missouri Constitution. Section 1 of said Amendments provides that the Supreme Court shall consist of seven judges and shall be divided into two divisions, Division One to consist of four judges and Division Two to consist of three judges, and that causes may be transferred from Division to the Court as provided in Section 4.

Section 4 of said amendments is as follows:

> "When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; *or, when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision*" (Italics ours).

Under said provisions of the Missouri Constitution, the judgment rendered by Division Two was not rendered

by the highest court of Misssouri in which a decision could be had.

Gorman v. *Washington University*, 86 L. Ed. 895, decided April 27th, 1942.

While the first clause of Section 4 affords to the losing party the privilege of a transfer as a matter of right when certain grounds exist, the last clause provides for such transfer whenever the division shall "so order." Rule 24 of the Missouri Supreme Court is as follows:

> "A motion to transfer a cause under the provisions of the Constitution from either division to Court *en banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23."

Under said constitutional provisions, said rule and the decisions of the Missouri Supreme Court, a division of said Court has the power, and it is the practice to transfer a cause to the Court *en banc*, on the application of the losing party, either on the mandatory grounds provided for in the first clause of said Section 4 or on other grounds appealing to its discretion under the last clause of said section.

In *Edward L. Scheufler, Supt. of the Insurance Dept.*, v. *Manufacturers Lumbermens Underwriters*, The Missouri Supreme Court *en banc* in a *per curiam* opinion decided July 7, 1942, not yet reported (see Exhibit 1 in Appendix hereto, the originals of all exhibits therein, duly certified, being filed with the clerk of this Court), in speaking of transfers to the Court *en banc* under the last clause of the above constitutional amendment, *i. e.*, the provision for discretionary transfers, said:

> "Under the last clause of this section either division, on *application* or its own motion and for reasons deemed sufficient *though not enumerated in the section* may order a cause transferred to the court *en banc* (Italics ours).

Exhibits 2 and 3, hereto attached, duly certified by the Clerk of the Supreme Court of Missouri, disclose that in the cases of *A. S. King et al., Trustees,* v. *Kansas City Life Insurance Company* and *Ed. L. Klotsch* v. *P. F. Collier & Sons,* Division Two, after decision by it, transferred said cases to the Court *en banc* on motions by the losing parties therein where none of the mandatory grounds of transfer provided in the first clause of the aforesaid Section 4 existed. There were no opinions in said King and Klotsch cases on said motions to transfer, but said exhibits disclose: 1. That no federal question was involved and no Judge of Division Two dissented from the opinion in said Division in either case, and, 2. That motions to transfer to the Court *en banc* were filed, said motions were based on discretionary grounds and not on any mandatory ground specified in the first clause of said Section 4, and that said motions to transfer were sustained by said Division.

Divisions of the Missouri Supreme Court rarely write opinions on motions to transfer but in examining the last few volumes of Missouri cases in the Southwestern Reporter, we find the following cases went to the Court *en banc* although they were decided unanimously in division and no federal questions were involved.

Young v. *Hilmer,* 154 S. W. 2d 87.

Troost Avenue Cemetery Co. v. *Kansas City et al.,* 154 S. W. 2d 90.

From the wording of the last clause of the constitutional provision itself it is clear that a Division has the power to transfer upon any ground addressed to its discretion. In the *Scheufler case, supra,* the Court so declares, and the King and Klotsch cases are typical examples of the frequent exercise of such power.

Under the decisions of this Court there is no authority for the issuance of certiorari to a state court until all possibilities of review by the highest court of the state have been exhausted.

In *Gorman* v. *Washington University* (*supra*), this Court said:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. *Fisher* v. *Perkins*, 122 U. S. 522; *McComb* v. *Commissioners*, 91 U. S. 1, 2; *McMaster* v. *Gould*, 276 U. S. 284; *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186; *Stratton* v. *Stratton*, 239 U. S. 55; *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116; *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339."

In *Andrews* v. *Virginian Ry. Co.*, 248 U. S. 272, 275, this Court said:

> "It is true that, under the law of Virginia, in a case like this the power of the court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the *existence* of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by the court of its rightful authority. That this is true would seem to be demonstrated by considering that if it were not so, a judgment of the state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse, thus, in substance, depriving each court of its power, and begetting the possibility of conflict and confusion" (Italics ours).

In *Mullen* v. *Western Union Beef Co.*, 173 U. S. 116, 123, this Court said:

> "And although the Supreme Court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.
>
> "We must decline to hold that it affirmatively appears from the record that a decision *could not have been had* in the highest court of the state, and this being so, the writ of error cannot be sustained. *Fisher* v. *Perkins*, 122 U. S. 522" (italics ours).
>
> See, also, *Matthews* v. *Huwe*, 269 U. S. 262, 265.

Since the record fails to disclose that petitioner by motion or by any other means has exhausted his possibilities for review by the Missouri Supreme Court *en banc*, the judgment sought to be reviewed is not the judgment of the highest Missouri court in which a decision could be had. We, therefore, urge that this court has no jurisdiction to review this decision and the petition for a writ of certiorari should be denied.

II.

Even If This Court Has Jurisdiction the Petition for a Writ of Certiorari Should Be Denied.

The decision of the Missouri court is that a master is not liable under the Federal Employers' Liability Act for an act of horseplay of his servant, known to be addicted to horseplay, when committed outside the scope of his employment and where liability is predicated on the theory that he retained a dangerous servant in his employ and on the theory that the master failed to protect another servant from such an act. That decision is in harmony with the following applicable decisions of this court:

In *Davis* v. *Green*, 260 U. S. 349, an employee of a railroad, known to be dangerous, while acting outside the scope of his employment, shot and killed another employee of the railroad. The theory of recovery under

the Federal Employers' Liability Act was the employment of a dangerous man. This Court in denying liability said:

> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to futher the master's business or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of *respondeat superior* applies."

After the Green case, the plaintiff in *Atlantic Coast Line* v. *Southwell*, 275 U. S. 64, seeking to avoid the effect of the decision of this Court in the Green case, based his right to recover under the Federal Employers' Liability Act for the death of an employee caused by another employee acting outside the scope of his employment, on the employer's failure to prevent the death where the master knew of bad feeling between the employees. The Court in denying the right of recovery said:

> "* * * In view of the decision in *Davis* v. *Green*, 260 U. S. 349, 67 L. Ed. 299, 43 Sup. Ct. Rep. 123, the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied upon its *failure to prevent the death.*
>
> * * * * * * *
>
> "It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yardmaster, knew that Southwell, the man who was killed, on previous occasions had used threaten-

> ing language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him, 'Cap., all I want to do is to ask Southwell to lay off of me and let me alone,' and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him he might bring about unpleasant consequences; that Fonvielle left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separating them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to foreshadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitioner liable in a case like this."

The Green and Southwell decisions completely dispose of petitioner's contentions here that there is liability at common law for (1) the retention of a man known to be addicted to horseplay where his act of horseplay causing injury was outside the scope of his employment and (2) failure to protect against such an act of such a man.

Petitioner seeks to enlarge the master's common law duty to protect Osment from Stalac's act outside the scope of his employment, by claiming that the master here had assumed the duty of protection against acts of an employee outside the scope of his employment, by creating a special service department. His petition (R. 2) does not plead the rules of the special service department by which it is erroneously claimed such an assumed duty arose. In Missouri, where it is sought to enlarge the

master's common law duties by rules, the rules must be pleaded which was not done. *Nivert* v. *Wabash R. Co.*, 232 Mo. 626, *Kirkland* v. *Bixby*, 282 Mo. 462, and *Martin* v. *Wabash Ry. Co.*, 325 Mo. 1107.

Further, the first and second grounds of negligence alleged in the petition, as set out on page 4 of this brief, are based on the retention of Stalac. The third ground of negligence, see this brief page 4, which is based on Finnell's failure to act, with time, means and opportunity at hand to prevent the injury after Osment's peril arose, was not submitted to the jury (R. 297) and petitioner took no appeal from the action of the trial court's refusal to submit. Also we contend that the rules should not be interpreted as raising a duty to Osment beyond that imposed by the common law and were never intended for that purpose. They were the rules of a separate department and Osment did not know what they were (R. 135). We also contend that Furnell's failure to act was not the proximate cause of Osment's injury. Osment's witnesses agree that Osment did not cry out or struggle, he did not change appearance until he dropped to the ground, and there was nothing in his actions or appearance that indicated that he was in any trouble or difficulty until he dropped to the ground (R. 33, 44, 45, 50).

But regardless of these contentions, there is no liability here. In *St. Louis & S. F. Ry.* v. *Mills*, 271 U. S. 344, it was contended that because the Railway Company furnished a guard to protect an employee on his way home during a strike, that the Railway Company was liable for the employee's death caused by one of the strikers in the presence of the guard. This court held that there is no duty growing out of the relationship of employer and employee requiring the employer to guard the employee, and that the fact that the employer voluntarily provided some protection against apprehended danger did not give rise to an inference that it undertook to do

more. The Court further held that it would not do for the jury to speculate on what would have happened if additional guards had been present. In the course of its opinion this court said:

> "* * * There was no evidence that petitioner had ever furnished decedent or any other employee with more than one guard in going to or from work; or any other evidence from which it could be inferred that petitioner had undertaken, or held itself out as undertaking, to furnished more protection to the decedent or its other workmen 'than it actually did furnish.'
>
> "The respondent here asserts that the defendant, having assumed to do something, should have done more. But the bare fact that the employer voluntarily provided some protection against an apprehended danger, by undertaking to do something which involved no special knowledge or skill, can give rise to no inference that it undertook to do more. Respondent therefore relies on the breach of a duty which does not exist at common law, and of whose genesis in fact it offers no evidence."

Thus the Green, Southwell and Mills cases, decided by this court, establish: (1) that the master is not liable for the assault by a known dangerous employee upon another where the act is not committed in the scope of the dangerous employee's employment or in furtherance of the master's business; (2) that even though the master has knowledge of the dangerous characteristics of an employee, and even though he may anticipate that those characteristics will bring about a situation where someone is apt to be hurt, the master is under no duty to prevent or protect against an act which was not done in the course of the master's business; (3) that even though the master may anticipate danger to the employee from the acts of others, either not employees or employees acting outside the scope of employment, and even though the master may assume some duty to protect against those acts, that assumption does not make the

master an insurer, or require him to give more protection than he has actually assumed to give.

Petitioner cites *Fletcher* v. *B. & P. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, as authority for the proposition that a master has a duty to control his servant while acting outside of the scope of his employment. The liability in that case was not predicated on the duty of a master toward his servant, but was based on the duty of a railroad toward members of the public who may be lawfully using the street. Briefly the facts were as follows:

For a period of several years the defendant railroad had given its express consent that workmen, returning home at the close of the day's work, might take home for firewood odd pieces of bridge timber, ties, etc., which were left over after repairing the road. The railroad had consented that these odd pieces might be thrown off the moving train at points nearest the homes of the respective men, with the admonition that the men must be careful not to hurt anyone in throwing the wood off. Plaintiff was employed in the shop of the railroad and had finished his day's work and was walking home along the street when a piece of timber was thrown from the train, striking and injuring plaintiff after it rebounded on the street.

The question for consideration was, as stated in the opinion page 140, "whether the company was guilty of an omission of the duty which it owed the plaintiff, as one of the public lawfully using the street where the track was." Although the plaintiff was employed in the defendant's shops, yet, at the time of the injury, he had finished his work and was walking along the street toward his home and his status was that of "one of the public lawfully using the street."

The opinion of the Court in holding the defendant liable is not controlling here for a number of reasons, to-wit: (1) It was decided prior to the *Green*, *Southwell* and *Mills cases*, *supra;* (2) it did not arise under

the Federal Employers' Liability Act, nor did it involve the relation of master and servant between plaintiff and defendant; (3) it involved the duty of a common carrier to persons using public streets and any reference to private property is dictum; (4) express consent was given by the railroad for the act done; (5) it was based on a practice or custom which was neither pleaded, proved nor relied on in the case at bar; and (6) although decided in 1897, it has never been cited by any United States court as upholding the doctrine contended for by the plaintiff here.

The decision of Division Two of the Missouri Supreme Court is in harmony with the *Green, Southwell* and *Mills cases, supra,* decided by this Court and the petition for a writ of certiorari should be denied.

Conclusion.

We respectfully submit that this Court has no jurisdiction to review the decision of Division Two of the Missouri Supreme Court and further that even if it has jurisdiction the Missouri decision not only does not conflict with the decisions of this Court but is in accord with them, and the petition for certiorari should be denied.

Respectfully submitted,

EDGAR SHOOK,
N. S. BROWN,
J. H. MILLER,
SAM B. SEBREE,
JOHN S. MARLEY,
SEBREE, SHOOK & GISLER,
Attorneys for Respondents.

APPENDIX.

"Exhibit 1."

IN THE SUPREME COURT OF MISSOURI

EN BANC.

MAY TERM, 1942.

Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri, *Respondent,* versus Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange, *et al.*, *Defendants,* Central Surety and Insurance Corporation, a corporation, and R. E. O'Malley, *Appellants.*	No. 37663* No. 37664*

PER CURIAM. The respondent Superintendent of Insurance asks leave to file here a motion to transfer the above causes from Division II to this court en banc on the ground that a federal question is involved. He has also filed a similar motion in Division II, where the causes have been finally determined adversely to him. His explanation of the reason for this duplicated procedure is that if the motion to transfer be overruled by Division II he will not have exhausted all available means of securing an appellate review of the causes by this court en banc, unless he files the same motion here. This, he says, is prerequisite to an application for review by certiorari or appeal in the United States Supreme Court, under a

recent decision of that court in *Gorman* v. *Washington University*, 62 S.Ct. 962, 86 L.Ed. 895.

We do not so read the Gorman decision. According to our understanding it was based on the fact that no application for a transfer had been made *to Division I* of this court after adverse determination of the cause by that Division. (See *Washington University* v. *Gorman*, 348 Mo. 310, 153 S.W. (2d) 35.) The opinion does not expressly so state, and does say (italics and parenthesis ours): "it does not appear that the judgment thus rendered (by Division I) has been *reviewed* by the Supreme Court sitting en banc." But it further declares there was also no showing "that petitioners have made application, as they could have done under §4 of the 1890 amendments to the state constitution, to transfer the cause to the full court for review." The opinion then summarizes Secs. 1 and 4 of said amendment, and quotes part of our Rule 24, which provides: "A motion to transfer a cause under the provisions of the Constitution from either division to Court *En Banc* must be filed within ten days after the final disposition of the cause by the division, * * *." The record of the Gorman case in this court shows no application was made to Division I to transfer the cause to the court en banc.

Ever since the decision of *State* v. *Duestrow*, 137 Mo. 44, 91, 39 S.W. 266, in 1896, it has been the settled law of this state that such motions must be filed in whichever of the two Divisions of this court has decided the case; and that the court en banc cannot compel a transfer of the cause. This rule is based on the provisions of said Sections 1, 3 and 4 of the Amendment of 1890 to Article VI of our Constitution. Sec. 1 creates two divisions of the Supreme Court and gives them *concurrent* jurisdiction of all matters and causes in the court, except that Division II shall have exclusive cognizance of all criminal cases. The section contains a proviso that a cause in a Division may be transfered to the court en banc as provided in Sec. 4. And the latter section provides that for

specified reasons causes shall be transferred to the court en banc "on the application of the losing party." This has always been construed to mean that the application for the transfer must be made in the Division *from which* the transfer is sought. Under the last clause of this section either division, on application or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court en banc.

Respondent calls attention to *McFadin* v. *Catron*, 138 Mo. 197, 227, 39 S.W. 771, where (respondent says) the court en banc unanimously entertained a motion to transfer a cause from Division II and denied it with the statement that no facts existed as specified in Sec. 4, warranting a transfer. He contends the court would have stricken the motion from its files without reference to the merits thereof, if it had meant to refuse to entertain the motion. But the opinion also cited the Duestrow case, and quoted the part holding that "motions filed subsequent to a judgment in a cause are matters pertaining thereto, and must be filed in the division which rendered the judgment." So, also, in *State* v. *Hamey*, 168 Mo. 167, 175, 65 S.W. 946, 57 L.R.A. 846, the court en banc unanimously ruled that an order of a Division transferring a cause to it did not operate as the allowance of an appellate review. The *Duestrow case* (137 Mo. l.c. 95, 39 S.W. l.c. 268) squarely holds that Sec. 4 of the Amendment does not give the court en banc superintending control over a Division.

The Amendment of 1890 was adopted to expedite the work of the court by creating two divisions of concurrent jurisdiction, each with the separate power to adjudicate causes coming to the court; and with the further power to determine when causes before it shall be transferred to the court en banc under Sec. 4 of the Amendment.

The application for leave to file en banc a motion to transfer the causes from Division II is denied. All concur except Gantt, J., absent.

STATE OF MISSOURI—SCT.:

I, E. F. ELLIOTT, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said Court, delivered in the foregoing entitled cause, on the 7th day of July 1942, as fully as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 14th day of July 1942

E. F. Elliott,
(Seal) Clerk.

"Exhibit 2."

IN THE SUPREME COURT OF MISSOURI

BE IT REMEMBERED that on the 25th day of October, 1941, Division Number Two of the Supreme Court of Missouri rendered an opinion in which all of the Judges concurred, in the case of *A. S. King et al., resps.* vs. *Kansas City Life Insurance Company, a corporation, app.*, No. 37426, affirming the judgment of the Circuit Court of Jackson County.

- - -

And thereafter and on the 13th day of November, 1941, the following proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Comes now the said appellant, by attorney, and files its motion to transfer this cause to the Court en Banc.

- - -

Which said motion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI

DIVISION NO. 2

SEPTEMBER TERM, 1941

A. S. King and I. A. Smith, Trustees of Hinkle Company,
Respondents,
v.
Kansas City Life Insurance Company, a corporation,
Appellant.

No. 37426

MOTION TO TRANSFER TO COURT EN BANC

Comes now the appellant (defendant below) and moves the Court to transfer this cause to the Court *en banc* for the following reasons:

(1) It concededly appears that all of the grounds of the motion for a new trial *raising questions of law* were abandoned, leaving only the inadequacy of the verdict ground. The opinion holds that the general order of the trial court sustaining the motion may be affirmed upon the single ground that the verdict was against the weight of the evidence. From this it follows that in *all* cases where there is a sharp conflict in the evidence such general ruling of the trial court must be affirmed. This permits the condemned practice to continue unabated and the injustice of the same to actively survive. The opinion does not abate the evil but tends to make all appeals from such orders unavailing, if perchance the movant has a weight of the evidence ground in the motion which *may* have formed the basis of the trial court's general order violative of the statute.

(2) The opinion holds that the respondents (movants below) carry their burden and comply with their obligation to point out error and that the verdict may be properly set aside by such general order whenever they point out that the motion contains a ground that the verdict was against the weight of the evidence which may have

formed the basis of the court's action even though, as here, the evidence preponderated in favor of the appellant and the issues of compensatory, exemplary and nomial damages were submitted by unchallenged instructions.

(3) The opinion requires the appellate court to (a) either itself weigh the evidence (which it has no right to do) *or* (b) to follow the old, now repudiated, practice of assuming that the trial court sustained the motion on *all* of the grounds set forth therein, - following on this point the now overruled case (among others) of *Gray* v. *Hannibal*, 29 S. W. (2d) 710, 713. The opinion vigorously challenges and negatives the correctness of both hypotheses, but, by its order of affirmance, necessarily *follows* one or the other of them.

(4) The statute (Section 1169, R. S. 1939) limits the power of the trial court in granting successive new trials. Does the order appealed from exhaust such power or may the court below grant another new trial specifically basing its order upon the weight of the evidence ground? The order below is silent; does the opinion supply the omission? *Gray* v. *Hannibal*, *supra*, seems to hold to the contrary and is not overruled on this point.

(5) By its opinion the Court overruled a number of cases, some of which were decided by Division One of this Court. The questions involved are of great importance to the bar and to the *nisi prius* judges, and should be finally and definitely settled by the entire court sitting *en banc*, thereby avoiding possible conflict between the two divisions of this Court, and, at the same time, setting at rest for all time confusing and troublesome questions, which have long sought solution, affecting orderly procedure in trial courts of law and in appellate courts as courts of error.

COOPER, NEEL & SUTHERLAND
FRANK J. ROGERS,
Attorneys for Appellant

- - -

And thereafter and on the 16th day of December, 1941, the following further proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Now at this day, the Court having seen and fully considered the appellant's motion to transfer this cause to the Court en Banc, doth order that said motion be and the same is hereby sustained.

- - -

STATE OF MISSOURI--Set.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages contain a full, true and complete copy of the motion to transfer to Court en Banc, together with the record entries showing the filing and sustaining of said motion, in a cause entitled A. S. King et al., respondents, against Kansas City Life Insurance Company, appellant, No. 37426, as fully and completely as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson City, this 9th day of July, 1942.

E. F. Elliott

(seal) Clerk, Supreme Court of Missouri.

"Exhibit 3."

IN THE SUPREME COURT OF MISSOURI

BE IT REMEMBERED that on the 10th day of June, 1941, Division Number Two of the Supreme Court of Missouri rendered an opinion in which all of the Judges concurred, in the case of *Edward F. Klotsch, resp.* vs. *P. F. Collier & Son Corporation and Elmer U. McAtee, apps.*, No. 37124, reversing the judgment of the Circuit Court of the City of St. Louis as to the appellant P. F.

Collier & Son Corporation, and affirming the judgment as to the appellant Elmer U. McAtee.

- - -

And thereafter and on the 4th day of August, 1941, the following proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Comes now the said respondent, by attorney, and files his motion to transfer this cause to the Court en Banc.

- - -

Which said motion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI

DIVISION No. 2.

MAY TERM, 1941.

Edward F. Klotsch, *Respondent,* vs. P. F. Collier & Son Corporation, a Corporation, and Elmer U. McAtee, *Appellants.*	No. 37124

RESPONDENT'S MOTION TO TRANSFER TO SUPREME COURT IN BANC.

Comes now the respondent in the above-entitled cause and moves the Court to transfer this cause to the Supreme Court in banc, and as grounds of this motion states:

I.

Because the Court's opinion filed herein and per curiam opinion filed in ruling respondent's motion for a rehearing, are in direct conflict with the rulings and decisions of this Court in banc and of Division No. 1 of

this court in holding that respondent was conclusively bound by the adverse portions of defendant McAtee's testimony and was not entitled to the benefit of the favorable portions of said witness' testimony and the other evidence and the inferences to be drawn therefrom.

Perryman v. *Missouri Pac. Ry. Co.*, 31 S. W. (2d) 4 (Div. No. 1);

Gaugh v. *Gaugh* (Mo. Sup. in banc), 11 S. W. (2d) 729;

Black v. *Epstein*, 120 S. W. 754, 221 Mo. 286;

Smith v. *Kansas City Pub. Serv. Co.*, 43 S. W. (2d) 553.

II.

Because the Court's opinion filed herein and per curiam opinion filed in ruling respondent's motion for a rehearing overlook testimony printed in the record, other than testimony of McAtee on cross-examination tending to prove that he intended collecting for his master, Collier, sooner than Monday morning. In failing to hold that this evidence made a submissible jury issue, this Court repudiates and is in direct conflict with the decision of this Court in banc in *Pulitzer* v. *Chapman*, 85 S. W. (2d) 411.

III.

Because this Court's opinions filed herein hold as a matter of law that the trip would have been made even though Collier's business had been canceled before McAtee started, and that McAtee's master, Collier, is not liable even though McAtee was at the time on a dual business and pleasure purpose using an automobile essential to the master's business, carrying with him all of his master's records, driving in a direct route within his territory to his place of business to collect, and even though after the accident had been reported to it Collier Company paid the expenses for the operation of McAtee's automobile on said trip on which plaintiff was injured.

In so holding this Court's opinions are in direct conflict with the holdings of this Court in banc and in Division No. 1 as well as in this division.

McMain v. *J. J. Conner & Sons Const. Co.* (Div. 1), 85 S. W. (2d) 43;

Brunk v. *Hamilton-Brown Shoe Co.* (Div. 1), 66 S. W. (2d) 903;

Goldbaum v. *Mulligan Printing Co.*, 149 S. W. (2d) 348;

Chastain v. *Winton*, 152 S. W. (2d) 165, l. c. 171;

State ex rel. Waters v. *Hostetter* (*In Banc*), 126 S. W. (2d) 1164;

McCoy v. *Simpson*, 139 S. W. (2d) 950.

IV.

Because this Court should not attempt to overrule the decisions of Division No. 1 or the Court in banc, but should transfer the case to the Court in banc for decision.

Wanger v. *Marr*, 257 Mo. 482.

Wherefore, respondent respectfully applies to and moves the Court to transfer the above cause into the Supreme Court of Missouri in banc.

Respectfully submitted,

FRED R. RODGERS,
N. MURRY EDWARDS,
DOUGLAS H. JONES,
Attorneys for Respondent.

- - -

And thereafter and on the 25th day of September, 1941, the following further proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Now at this day, the Court having seen and fully considered the respondent's motion to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby sustained.

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STATE OF MISSOURI--Sct.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages contain a full, true and complete copy of the motion to transfer to Court en Banc, together with the record entries showing the filing and sustaining of said motion, in a cause entitled Edward F. Klotsch, respondent, against P. F. Collier & Son Corporation and Elmer U. McAtee, appellants, No. 37124, as fully and completely as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson City, this 9th day of July, 1942.

E. F. Elliott

(seal) Clerk, Supreme Court of Missouri.

SEP 14 194
CHARLES ELMORE CR

No. 140

Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITIONER'S REPLY BRIEF.

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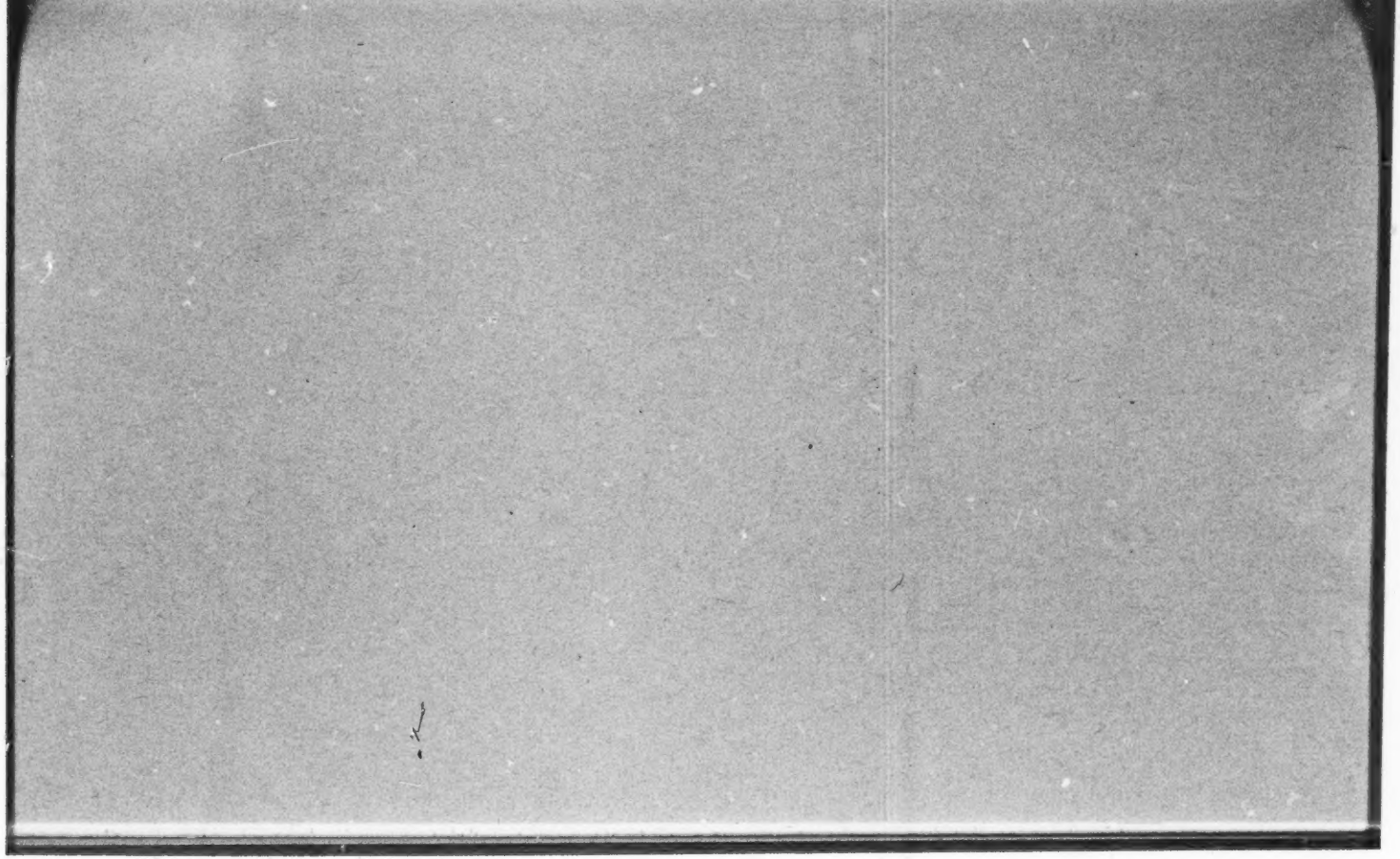

INDEX.

	PAGE
Argument	1
Jurisdiction	1
(a) Petitioner is not entitled to transfer to court en banc on motion as matter of right	8
(b) The court en banc had no power, discretionary or otherwise, to entertain an application to review the judgment of Division Two; and petitioner had no right to invoke jurisdiction of Division Two to grant a transfer under second clause of Section Four of Amendment after disposition by Division Two	10
(c) The court en banc is not a higher court than Division Two and a transfer to the court en banc does not constitute an appellate review but merely constitutes a rehearing	19
(d) Finality of Opinion	25
Conclusion	27

AUTHORITIES.

Aetna Ins. Co. v. Hyde, 327 Mo. 115, 34 S. W. (2d) 85	27
Andrews v. Virginian Ry. Co., 248 U. S. 272, 39 S. Ct. 101	3, 25
Betts v. Brady, 86 L. Ed. 1116	4
Central Union Tel. Co. v. City, 269 U. S. 190, 195, 46 S. C. R. 90, 91, 70 L. Ed. 229	6
Chesapeake and Ohio Ry. Co. v. DeAtley, 241 U. S. 310, 36 S. Ct. 564, 566	5

PAGE

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42 4

Fears v. Newman Merc. Co., (Mo. en banc), 156 S. W. (2d) 909, 910 23

Fisher v. Carrico, 122 U. S. 522, 7 S. Ct. 1227.. 3

Frohman v. Lowenstein, 303 Mo. 339, 260 S. W. 460 22

Gorman v. Washington University, 62 S. Ct. 962, 86 L. Ed. 895 ..... 2, 9, 19

Great Wstrn. Tel. Co. v. Burnham, 162 U. S. 339, 16 S. Ct. 850 3

Gypsy Oil Company v. Escoe, 275 U. S. 498, 48 S. Ct. 112 24

Hagon v. Paullin, 231 U. S. 583, 34 S. Ct. 178.. 5

Huckelberry v. Mo. Pac. Ry. Co., 324 Mo. 775, 26 S. W. (2d) 980, l. c. 988 9

Matthews v. Huwe, 269 U. S. 262, 46 S. Ct. 108.. 3

McAllister v. St. L. Mchts. Bridge & Ter. Ry. Co., 324 Mo. 1005, 25 S. W. (2d) 791..... 9

McComb v. County Commr., 91 U. S. 1, 23 L. Ed. 185 2

McFadin v. Catron, 138 Mo. 197, 39 S. W. 771.. 11

McMaster v. Gould, 276 U. S. 284, 48 S. Ct. 299.. 3

Minneapolis St. P. etc. Ry. Co. v. Rock, 279 U. S. 410, 49 S. Ct. 363 ..... 4, 10

Morgan v. Kroger Gro. Co., (Mo. en banc), 154 S. W. (2d) 44, 46 23

Morris v. K. C. etc. Co., 303 Mo. 475, 258 S. W. 431 22

Mullen v. Wstrn. Union Beef Co., 173 U. S. 116, 19 S. Ct. 404 3

North Laramie Land Co. v. Hoffman, 268 U. S. 276, 282, 45 S. C. R. 491, 494, 69 L. Ed. 953.. 6

PAGE

Riley v. Wabash Ry. Co., 328 Mo. 910, 44 S. W. (2d) 136, 142 9

Rowie v. Chicago, B. & Q. R. Co., 274 S. W. 1031 17

Scheufler v. Manufacturers Lumbermen's Underwriters, 163 S. W. (2d) 749 .....11, 13, 21

Smith v. K. C. Pub. Service Co., 328 Mo. 979, 43 S. W. (2d) 548, 555 23

Southern Electric Co. v. Stoddard, 269 U. S. 186 2

Southern Ry. Co. v. Clift, 260 U. S. 316, 43 S. Ct. 126 5

State ex rel. Berkshire v. Ellison, 287 Mo. 654, 230 S. W. 970, 971 25

State v. Duestrow, 137 Mo. 44, 39 S. W. 266.... 11, 21

State v. Haney, 168 Mo. 167, 67 S. W. 620..... 11, 22

Stratton v. Stratton, 239 U. S. 55, 36 S. Ct. 26.. 3

Stebbins v. Riley, 268 U. S. 137, 146, 45 S. C. R. 424, 427, 69 L. Ed. 884 6

Sutton v. Anderson, 326 Mo. 304, 31 S. W. (2d) 1026, 1030 23

Waggoner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226, 43 S. Ct. 589, 591 5

Watson v. Buck, 313 U. S. 387, 61 S. C. R. 962, 85 L. Ed. 1416 6

Wilson and Company v. Hartford Fire Ins. Co., 254 S. W. 266 17

STATUTES.

Article VI Constitution of Missouri, Sections 7-5 6

Section One Amendment of 1890 to ArticleVI.. 6, 11, 13

Section Three of Article VII of the Constitution 7, 13

Section Four of the Amendment of 1890 to Art. VI of Constitution of Mo. 6, 9, 11, 12, 13, 15, 17, 21

PAGE

Section 237(b) Judicial Code, 28 U. S. C. A. 344(b) 1, 2, 5
Section 1235 R. S. Mo. 1939 26
Section 2047, R. S. Mo. 1939 27

TEXT BOOKS.

Black's Law Dictionary, second edition 12, 20
21 C. J. S., page 21, Section Seven 20
Webster's New International Dictionary 12

RULES.

Rule 21 of Missouri Supreme Court 15, 21
Rule 24 of Missouri Supreme Court..6, 9, 10, 13, 15, 17, 26

No. 140

Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

PETITIONER'S REPLY BRIEF.

ARGUMENT.

JURISDICTION.

Respondents' objection to the jurisdiction of this Court is limited to the claim that petitioner has not come within the clause of Section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b) requiring that the judgment or decree to be reviewed, "has been rendered or passed by the highest court of the state in which a decision could be had", because:

"Under the provisions of the Missouri Constitution, the judgment rendered by Division Two was not rendered by the highest court of Missouri in which a decision could be had." (Respondents' brief, pp. 6-7).

The sole reason advanced is that:

"The losing party there (petitioner here) made no application to transfer the cause to the Missouri Supreme Court en banc, although the power of said *Division Two* to make such transfer on such application exists *under the second clause of Section 4* of the 1890 amendment to Article VI of the Missouri Constitution." (Respondents' brief, p. 6).

There is no claim that the judgment or decree is not final. The construction of the phrase: "Highest Court of the state in which a decision could be had", as employed in Section 237(b) of the Judicial Code is, of course, to be governed by the decisions of this Court. A careful study of the decisions of this Court, as cited by respondents and as cited by the Court in the recent case of *Gorman* v. *Washington University,* 62 S. Ct. 962, 86 L. Ed. 895, together with other decisions we have been able to discover, formulate the following construction of the clause in question:

1. Where the opinion or decision is not by the highest state court and where, under the laws and rules of court of the state, a review could have been obtained in the highest court of the state on application as a matter of right, as where the party has a specific right to force the Court to grant his request and such is not done, this Court has no jurisdiction to review the judgment.

Southern Electric Co. v. *Stoddard,* 269 U. S. 186.
McComb v. *County Commr.,* 91 U. S. 1, 23 L. Ed. 185.
Gorman v. *Washington University, supra.*

2. Where discretionary power to review exists in the highest court of a state, and state practice provides a fixed clear right to invoke such discretion and force the Court to act for or against the request, it is necessary to invoke the exercise of such discretion in order that, upon the refusal to do so, there may be no question concerning the right to review in this Court.

Fisher v. *Carrico,* 122 U. S. 522, 7 S. Ct. 1227.
Stratton v. *Stratton,* 239 U. S. 55, 36 S. Ct. 26.
Great Wstrn. Tel. Co. v. *Burnham,* 162 U. S. 339, 16 S. Ct. 850.
Mullen v. *Wstrn. Union Beef Co.,* 173 U. S. 116, 19 S. Ct. 404.
Andrews v. *Virginian Ry. Co.,* 248 U. S. 272, 39 S. Ct. 101.
Matthews v. *Huwe,* 269 U. S. 262, 46 S. Ct. 108.
McMaster v. *Gould,* 276 U. S. 284, 48 S. Ct. 299.

A review and analysis of the above cases indicate that this Court will decline jurisdiction only on the ground that the decision is not that of the highest court in the state, where:

1st. The decision appealed from is that of an inferior court of the state; and

2nd. Petitioner, as a matter of right upon application, either in such inferior court or in the highest court, is entitled to a review; or:

3rd. A clear right exists to file an application in the highest court for the purpose of forcing it to consider the application and exercise its discretion as to whether or not it will review the judgment.

It is not a necessary prerequisite to review by this Court that petitioner exhaust all conceivable remedies to have the cause heard in another or higher court or that he attempt by filing every conceivable type of pleading to arouse the *discretion* of a court or division to *entertain* an application in respect to such a remedy.

In *Minneapolis St. P. etc. Ry. Co.* v. *Rock,* 279 U. S. 410, 49 S. Ct. 363, this Court held that where the Supreme Court of Illinois had refused petitioner a writ of certiorari to the court of appeals of Illinois it was not necessary for it to exhaust all possible remedies by then applying to the Court of Appeals for a, "certificate of importance and appeal" for the purpose of invoking the discretion of that court to transfer the case to the Illinois Supreme Court.

In *Chesapeake & Ohio Ry. Co.* v. *Mihas,* 280 U. S. 102, 50 S. Ct. 42, this Court affirmed the holding in the Rock case.

Where there is a final judgment of a state court which is not subject to *review* by a higher state court, it is unnecessary for petitioner to exhaust all state remedies by appealing to other state tribunals for relief, even though he has a right to do so. In the recent case of *Betts* v. *Brady,* 86 L. Ed. 1116, petitioner had previously applied unsuccessfully for a writ of habeas corpus to Judge Bond, the chief judge of the Court of Appeals of Maryland. He then asked that a writ of certiorari issue from this Court to the Court of Appeals of Maryland. This Court pointed out, l. c. 1119:

> "The judgment was final in the sense that an order of a Maryland judge in a habeas corpus case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable. *It is true that the order was not final and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successively to one judge after another and to one court after another without exhausting his right.*" (Italics ours).

"Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had of the issue joined on the instant petition, we have jurisdiction to review it."

It does not appear that a petitioner must exhaust all of his remedies in the highest court of a state in which he may have an adjudication by asking for a rehearing therein. We have found no case so holding and the case of *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 43 S. Ct. 126, indicates that such is not necessary.

From the analysis thus made of Section 237(b) of the Judicial Code as construed by this Court, the conclusion is inevitable that this Court has jurisdiction to review the judgment herein, unless under the Constitution and laws of Missouri and rules of the Missouri Supreme Court: (1) The Court en banc is a higher court than Division Two; (2) Petitioner could have had the decision reviewed by the court en banc on application as a matter of right; or (3) the court en banc had discretionary power to review the judgment of Division Two and petitioner had a clear, fixed and specified right to invoke such power by motion and to force the Court to act for or against him.

These are questions of Missouri practice and procedure and are to be determined by referring to the Constitution, laws and rules of court of Missouri. Questions of state practice and procedure are controlled by the decisions of the state court, even though federal rights are in controversy.

Chesapeake and Ohio Ry. Co. v. *DeAtley*, 241 U. S. 310, 36 S. Ct. 564, 566.

Hagon v. *Paullin*, 231 U. S. 583, 34 S. Ct. 178.

Waggoner Elec. Mfg. Co. v. *Lyndon*, 262 U. S. 226, 43 S. Ct. 589, 591.

It is well established by the federal courts that they are bound by the meaning and application given state statutes and state constitutions by the courts of last resort of the state involved.

Stebbins v. *Riley,* 268 U. S. 137, 146, 45 S. C. R. 424, 427, 69 L. Ed. 884.

Central Union Tel. Co. v. *City,* 269 U. S. 190, 195, 46 S. C. R. 90, 91, 70 L. Ed. 229.

North Laramie Land Co. v. *Hoffman,* 268 U. S. 276, 282, 45 S. C. R. 491, 494, 69 L. Ed. 953.

Watson v. *Buck,* 313 U. S. 387, 61 S. C. R. 962, 85 L. Ed. 1416.

Although respondents have restricted their argument to the second clause of section four of the Amendment of 1890 and Rule 24 of the Missouri Supreme Court, it is necessary to go fully into the constitutional provisions governing the Supreme Court of Missouri and the interpretation given them by that court, to solve the jurisdictional question herein presented.

Article VI of the Constitution of Missouri created a supreme court of five judges and gave it appellate jurisdiction and general superintending power over inferior courts and power to issue, hear and determine remedial writs. (Sections 7-5, Article VI).

Section One of the Amendment of 1890 to Article VI of the Constitution of Missouri, increased the members of the Supreme Court from five to seven. It provides that the Court shall be divided into two divisions, Division One to consist of four judges, and Division Two to consist of three; that the divisions shall sit separately and have concurrent jurisdiction of all matters and causes in the Supreme Court, except that Division Two shall have exclusive jurisdiction of criminal cases. It further provides that a cause may be transferred to the court en banc as provided in Section Four of the amendment.

It further provides that the division of business shall be made as the Court may determine, and

> "All orders, judgments and decrees of either division as to causes and matters pending before it, shall have the force and effect of those of the court."

Section Two provides for the appointment and election of judges; their terms and to what division they shall be assigned.

Section Three provides that the Court shall assign to each division the causes and matters to be heard by it; that all laws relating to practice in the Supreme Court, as well as the rules of the Supreme Court shall apply to each division; that each division shall have the authority to issue the original writs and exercise the powers enumerated in Section Three of Article VI of the Constitution. (Section Three gives the Supreme Court, "general superintending control over all inferior courts" and gives it the, "power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial rights, and to hear and determine the same.")

Section Four of the amendment, which is made the basis of respondents' claim herein, provides as follows:

> "(1) When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from an opinion therein, or when a federal question is involved, the cause, on application of the losing party, shall be transferred to the court for its decision; or
>
> (2) When a division in which a cause is pending, shall so order, the cause shall be transferred to the court for its decision." (Numbering and paragraphing of the clauses, ours).

The only rule of the Missouri Supreme Court having reference to transfer to the court en banc is Rule 24. This rule has application only to the first clause of

Section Four since it applies, not to "pending" cases, but to those where there has been a "final disposition by the division". It merely limits the time in which an application to transfer under the first clause may be filed, to ten days. It is as follows:

> "A motion to transfer a cause *under the provisions of the constitution* from either division to the court en banc must be filed within ten days *after the final disposition of the cause by the division,* and notice of such motions may be given as provided in Rule 23." (Italics ours).

(a) Petitioner is not entitled to transfer to court en banc on motion as matter of right.

Although it cannot be denied that the Missouri Court en banc is not a higher court than Division Two, we will first dispose of the proposition that petitioner would, on application, have been entitled to a transfer to the court en banc. If any such right existed it had to be created by the first clause of Section Four.

Respondents make no claim that petitioner was entitled to make application for a transfer to the court en banc under the first clause of Section Four, and there would be no basis for such a claim because the judges of Division Two were not equally divided in opinion, there was no dissent and no, "federal question", was involved within the meaning given the phrase by the Missouri Supreme Court.

Under the decisions of the Supreme Court of Missouri, the meaning of the term, "federal question", as used in the amendment, is restricted to causes "involving construction of the Constitution of the United States, or where the validity of a treaty or statute of or authority exercised under the United States is drawn in question." The application and construction of rights arising under

the Federal Employers Liability Act and other federal acts do not constitute a "federal question" as that term is interpreted in Section Four of the amendment.

McAllister v. *St. L. Mchts. Bridge & Ter. Ry. Co.*, 324 Mo. 1005, 25 S. W. (2d) 791.

Riley v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 142.

Huckelberry v. *Mo. Pac. Ry. Co.*, 324 Mo. 775, 26 S. W. (2d) 980, l. c. 988.

The case of *Gorman* v. *Washington University*, 86 L. Ed. 895, 62 S. Ct. 962, cited by respondents, considered only the first clause of Section Four and did not consider or even quote the second clause on which respondents' claim herein is rested. In that case, a "federal question" within the meaning of the Missouri decisions was involved in that a construction of the contract clause of the Constitution was sought.

The losing party in that case had a given, fixed and clear right under the first clause of Section Four to make application for a transfer to the court en banc on the ground that a federal question was involved and it was the absolute duty of Division Two upon the timely filing of such application to transfer the case to the court en banc. This absolute right was given in a special class of cases and was as absolute as the right given by the statute to appeal from the judgment of the trial court.

This Court in its opinion points out that under the first clause of Section Four and under Rule 24 of the Supreme Court:

> "Division One of the Supreme Court of Missouri, sitting in the present case, in which 'a federal question is involved' was not the last state court in which a decision of that question could be had. * * * Such a case is one which 'after final disposition of the cause by the division' could on petitioner's ap-

> plication be transferred to the full court for review * * *. Since the Constitution of Missouri had thus provided *in this class of cases* for review of the judgment of a division, the judgment here of Division One is not that of the highest court of a state in which a decision could be had. * * *." (Italics ours).

The present case is not one which involved "a federal question" that could on petitioner's application be transferred to the court en banc "after final disposition by the division" since it did not belong to the class of cases in which such review was provided as a matter of right. The petitioner is in the same position as he would be if the first clause of Section Four and Rule 24 did not exist.

(b) The court en banc had no power, discretionary or otherwise, to entertain an application to review the judgment of Division Two; and petitioner had no right to invoke jurisdiction of Division Two to grant a transfer under second clause of Section Four of Amendment after disposition by Division Two.

Even though respondents contend that the Supreme Court en banc is the highest court in Missouri and that Division Two is an inferior court, and that petitioner had a right to make application to Division Two for a transfer, under the second clause of Section Four, we insist that this Court would still have jurisdiction of the cause under its own decisions. Jurisdiction has only been denied in cases where the petitioner had a right to apply to the highest court in the state for a review and to force the highest court to allow or deny the application (authorities, *supra*). This Court has never denied jurisdiction where the petitioner had failed to invoke the discretionary power of a lower court as to whether or not it would transfer the cause to a higher court. In *Minneapolis St. P. etc. Ry. Co.* v. *Rock,* and *Chesapeake*

& *Ohio Ry. Co.* v. *Mihas*, cited *supra*, jurisdiction was not denied for a failure to invoke the discretion of the inferior court to make a transfer to the highest court. Jurisdiction will only be denied where the lower court on application is *required* to transfer the case to the highest court.

It is definitely settled under the decisions of Missouri that the court en banc can not entertain an application to transfer and has no power to order a division to transfer the cause.

State v. *Duestrow*, 137 Mo. 44, 39 S. W. 266.
McFadin v. *Catron*, 138 Mo. 197, 39 S. W. 771.
State v. *Haney*, 168 Mo. 167, 67 S. W. 620.
Scheufler v. *Manufacturers Lumbermen's Underwriters*, 163 S. W. (2d) 749.

This alone should be sufficient to destroy respondent's claim. However, a study of the constitutional provisions and the Missouri decisions clearly shows that petitioner had no right to apply to Division Two to make a transfer of the cause under the second clause of Section Four.

Respondent's sole claim is that the petitioner was entitled to apply to Division Two for a transfer to the court en banc under the *second clause* of Section Four of the 1890 amendments to Article VI of the Missouri Constitution. The case stands as though this were the only provision in the Missouri Constitution governing transfers. This clause provides:

> "When a division in which a cause is *pending* shall so order, the cause shall be transferred to the court *for its decision.*" (Italics ours).

The use of the word "pending" must be particularly noted.

The word "pend" is defined in Webster's New International Dictionary as:

> "To hang as if balanced; to be undecided, or in process of adjustment, as, 'The decision is still pending'."

The word "pend" is defined in Black's Law Dictionary, second edition, as follows:

> "Begun, but not yet completed; unsettled; undetermined; in the process of settlement or adjustment. Thus, an action or suit is said to be pending from its inception until the rendition of final judgment."

This clause authorizes a division, for reasons of its own, to order an undecided, or "pending" cause of action transferred to the court en banc for submission and "its decision." The language used is quite different from that contained in the first clause wihch specifically provides for transfer in three specific instances "on application of the losing party", not while the case is pending, but "after final disposition by the division." Rule 24 can only be construed as applying to the first clause of Section Four since it provides that motions to transfer "must be filed within ten days *after the final disposition* of the cause by the division." It could have no application to the second clause of Section Four since the second clause *says nothing about an application or motion and is only applicable to causes "pending in a division."*

The second clause of Section Four grants no authority for a transfer to the court en banc "for review" on the Court's own motion or on application where the division has already made a "final disposition" of the cause by determining it.

It was the evident intention of the framers of the constitutional amendment of 1890, as expressed in Sections One and Three that *all causes should be assigned to a division for hearing and decision,* except that a

division could, if it saw fit, order a cause "pending" before it assigned to the court en banc for hearing and decision under the provisions of the last clause of Section Four. This is the only provision by which a cause may get to the court en banc for original submission and decision. This clause was undoubtedly put in the amendment for the purpose of permitting seven judges instead of the judges composing a division to pass on matters which the division felt were of unusual significance.

It is also evident from Sections One and Three of the amendment *that the decision of a division is to be final and conclusive in all cases assigned to it* unless all the judges of the division do not concur, or unless the construction of the federal constitution is involved or the validity of a treaty, statute or authority exercised under the United States is drawn in question. In such cases the first clause of Section One provides that the losing party may have a rehearing before the Court en banc if he so desires.

Notwithstanding the clear purpose and intention of the amendment as expressed in Sections One, Three and Four, and the clear language of Rule 24, respondents claim that petitioner's rights herein should be denied because Division Two had the power under the second clause of Section Four to make a transfer of the cause on application after it had finally disposed of the case. This claim is rested exclusively on certain language used by the Missouri Supreme Court in an opinion handed down July 7th, 1942, after petitioner had filed his application for certiorari in this Court (June 11th, 1942). In *Scheufler* v. *Manufacturers Lumbermen's Underwriters, et al.,* 163 S. W. (2d) 749, the losing party in Division Two filed a motion with the court en banc, asking leave to file a motion to transfer from Division Two to the

court in banc under the provisions of the first clause of Section Four on the ground that a federal question was involved. He had filed a similar motion in Division Two where the cause had been finally determined adversely to him. The Court held that motions to transfer must be filed in the Division which had decided the case and that the court en banc could not compel a transfer of the cause; that the first clause of Section Four "has always been construed to mean that the application for the transfer must be made in the division from which the transfer is sought." The court en banc denied the application for leave to file a motion to transfer.

In passing thereon, the Court went into the field of dicta and made the following voluntary statement concerning the last clause of Section Four, although it was not involved: It is this voluntary statement of a matter not in issue upon which respondents rely:

> "Under the last clause of this section either division, on application or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court en banc."

This is the only place in the Constitution, the laws, the court rules or the decisions of Missouri where any language is employed indicating that a division may act on an *application* under the last clause of Section Four. It does *not* hold that such application will lie "after a final disposition of a cause in a division." It gives no hint as to what the form of such application should be or what reasons would be "deemed sufficient" by the division as a basis for transfer. There is absolutely nothing in any provision of the Constitution, the code or in any rule or opinion of the Missouri Supreme Court to advise litigants as to what facts must be shown in an application to the Court on which to predicate an order

to transfer a cause to the court en banc under the second clause of Section Four.

If the language used in the Scheufler opinion can be construed to mean that the second clause of Section Four gives a litigant the right to apply to a division for leave to file an application to transfer after an adverse decision in that division, there is certainly an utter failure to give litigants or counsel any measuring stick by which such right may be exercised or to refer them to any rule, decision or constitutional provision that will enlighten them.

A comparison of Rule 21 governing motions for rehearing and Rule 24 clearly shows this insufficiency.

Rule 21 definitely prescribes the form and the contents of a motion for rehearing. Rule 24 merely refers to the constitutional provisions, which in turn, only provide for such motion or application in the class of cases mentioned in the first clause.

Boiled down, respondent's claim is that this Court should deny petitioner's application solely because he did not attempt by continuing to file motions and applications to excite or arouse some undefined discretion claimed to exist in Division Two after his petition for rehearing was overruled and the judgment became final; and that he was required to do so because of a statement made by the Court in the Scheufler case, *supra,* as to some mysterious and undefined discretion granted Division Two under the second clause of Section Four. Respondent could as well contend that a second or a third motion for rehearing should have been filed.

Under the Scheufler opinion, the division *is not required to entertain such an application,* but would first exercise its discretion as to whether the filing of such application would be permitted and if it sustained the

petition to entertain the application, it would then be at liberty to use its discretion as to whether or not it would grant it.

Since the Court has the power to set itself in motion, regardless of any application, petitioner could do nothing more than conjure up some reason that the Court would "deem sufficient" to justify it in setting itself in motion to set aside its opinion and grant a rehearing in the court en banc. The application could be nothing but a suggestion to the Court of some reason that the Court would deem sufficient for granting such transfer had it thought of the matter itself instead of having it called to its attention.

If litigants are not advised as to the basis upon which the Court will act to transfer a cause to the court en banc for grounds other than those mentioned in the first clause, they cannot be considered as having a clear, specific or fixed right to file any such application and their failure to do so should not result in their being penalized by this Court. Litigants cannot be bound by indefinite rights which are not reflected in the constitution, statutes, rules or published decisions. The provision in question has been in the Constitution of Missouri for fifty years and during that time neither the Legislature nor the Supreme Court have advised litigants or their counsel of the basis upon which a motion to transfer to the court en banc will lie, when not governed by the provisions of the first clause of Section Four.

Respondents in their brief set out two cases they have been able to discover in which a division entered an order transferring a cause to the court en banc after final disposition in the division where the grounds enumerated in the first clause of Section Four did not exist. It is obvious that the division in ordering the

transfer *did not do so under Section Four and Rule 24.* The division had made a "final disposition" of a cause not specified in the first clause of the section and the last clause only authorizes a division to make such transfer in "pending" causes.

Further, an examination of the opinion of the Missouri Supreme Court in the Klotsch case, 159 S. W. (2d) 589 (not yet officially reported) discloses that the Court entirely ignores the fact that the cause was transferred to the court en banc. Not a word in the opinion in any way indicates on what basis the division granted the Motion to Transfer. Nor does any other case which we have been able to find, *except those cases,* such as *Wilson and Company* v. *Hartford Fire Ins. Co.,* 254 S. W. 266; *Rowie* v. *Chicago, B. & Q. R. Co.,* 274 S. W. 1031 and others, *wherein the specific grounds contained in what we may term part one of the Section Four of the Amendment are considered.*

We therefore strongly urge upon this Court that in view of the Constitution, Statutes, rules and decisions of Missouri and the Missouri Courts, this Honorable Court cannot in the administration of justice require this applicant to pursue so nebulous a procedure as respondents would urge as a prerequisite to review by this Court. Litigants cannot lose their rights by failing to pursue remedies which are not only hidden from them but which even by the most diligent search and effort they cannot ascertain. The most fundamental rule of our jurisdiction is that the people are entitled to be fairly advised of laws and rules which are to bind them in the conduct of litigation. A decision of this Court denying the Writ would violate this most sacred principle.

Without in any way receding from the foregoing position, we would also point out that the filing of a motion to transfer to the court en banc should not be material in this case. This Court has never held that a litigant loses his rights by failing to do a frivolous thing. A useless, frivolous and meaningless procedure will never be required. We cannot know from any reported decision what grounds are recognized by the Supreme Court of Missouri as a basis for a transfer to the court en banc, but assuming that the Supreme Court did act in the two cases set out in their brief, because of conflict in the decisions of the two divisions, certainly no such ground existed in the present case.

These two cases were not transferred because of the constitutional provisions but because of the inherent discretionary power of a court to order a rehearing. Surely petitioner was not required to appeal to the inherent power of a court over its judgments as a prerequisite to review by this Court, which no rule of the Court either requires or permits.

Petitioner filed a comprehensive motion for rehearing in Division Two on December 26, 1941 (R. 516). In this motion and suggestions in support thereof he called the Court's attention to the reasons why the opinion was wrong and why a rehearing should be granted (R. 525-560). The original opinion was based on Division Two's construction of certain decisions of the Supreme Court of the United States and not on any prior decision of either division of the Supreme Court of Missouri. There were no decisions of Division One on the subject so that there could be no conflict between the opinions of the two divisions. The motion for rehearing was kept under advisement until March 13, 1942, a period of almost three months before being overruled. Division Two found

nothing which it "deemed sufficient" to arouse its discretionary power to transfer the cause to the court en banc. Petitioner could have set out no other or further reasons to justify a transfer to the court en banc in a motion for that specific purpose subsequently filed. The Court had inherent power to transfer the cause to the court en banc upon the motion filed by the petitioner but the Court decided the decision was sufficient and that no further hearing was required. In the light of the fact that petitioner has filed and had overruled by the Court his petition for rehearing and otherwise did everything required of him by the rules of the Court to protect his rights, can this Court refuse him the right to be heard because he failed to do something so frivolous and useless that the Supreme Court of Missouri does not even make provision for it in its rules? Surely substantial justice cannot be rendered on this basis.

(c) The court en banc is not a higher court than Division Two and a transfer to the court en banc does not constitute an appellate review but merely constitutes a rehearing.

Even if petitioner had a clear, fixed right to ask a transfer of the case, there can be no substance to respondents' contention unless the Court en Banc is the highest Missouri court and Division Two is an inferior court. Respondents cite only the case of *Gorman* v. *Washington University, supra,* in support of the proposition that the Court en Banc is the highest court in the state and Division Two is an inferior court. We have carefully examined the briefs in the Gorman case and find that the jurisdictional point was not raised or briefed by either petitioner or respondent but was raised by the Court on its own motion. We have likewise examined petitioner's motion for rehearing in that case and

find that this Court was not given the benefit of any authorities on that particular subject. Since this is a state procedural matter, the decisions of the Missouri court and not the decisions of this Court are controlling on this proposition.

Black's Law Dictionary, Second edition, thus defines "superior" and "inferior" courts:

> "The former being courts of general original jurisdiction in the first instance and which exercise a control or supervision over a system of lower courts, either by appeal, error or certiorari; the latter being courts of small or restricted jurisdiction, and subject to the review or correction of higher courts."

21 C. J. S., page 21, Section Seven, had this to say concerning superior and inferior courts:

> "A superior court is a court with controlling authority over some other court or courts, and with certain original jurisdiction of its own. Inferior courts are those which are subordinate to other courts, or which are of a very limited jurisdiction; those which are of very restricted jurisdiction and whose judgments and decrees can be reviewed by the higher tribunals. According to the technical meaning of the term, inferior courts are those the judgments of which, standing alone, are mere nullities, and whose proceedings, in order to give them validity, must show their jurisdiction."

When we apply the above definitions to the court en banc and the divisions thereof, it is readily apparent that the court en banc has none of the characteristics of a court superior to the divisions.

There is nothing in the amendment of 1890 to indicate that it intended to set up any intermediate or inferior appellate courts. It reads as follows:

> "All orders, judgments and decrees of either division as to causes and matters pending before it, shall have the force and effect of those of the court."

It was the clear purpose of the framers of the amendment to speed up the administration of justice in the Supreme Court of Missouri by increasing the number of judges and dividing them into two divisions and giving the divisions all of the powers and jurisdiction originally granted the Supreme Court to be concurrently exercised. It was clearly the purpose of the amendment to make judgments and orders of divisions the final judgments and orders of the Court. Sections One and Three provide for this. *Scheufler* v. *Manufacturing Lumbermen's Underwriters*, 163 S. W. (2d) 749, *supra.*

Section Four provides the only exceptions. The first clause does nothing more than permit a rehearing of certain cases by the full court and the second clause provides the only method by which the full court may originally hear and determine causes. The amendment merely divides up the work of the Court by providing in effect for three separate courts, Division One, Division Two, and the two divisions collectively. Each court is entirely independent of the others except that the divisions control the court en banc to the extent that they are the sole judges of the matters to be heard by it. The court en banc is given no original jurisdiction. It cannot review or set aside a divisional opinion. This is the clear meaning of the amendment and it has been so interpreted by the Missouri Supreme Court.

In *State* v. *Duestrow*, 137 Mo. 44, 39 S. W. 266, the Court held:

1. "The Supreme Court has no superintending control over a division;"

2. "Nor does an appeal or writ of error lie from it to the Court;"

3. "A division cannot be said to be inferior to the Court;"

4. "The judgment of a division has the same force and effect as a judgment of the Court;"

5. "Neither the subject matter, the amount in dispute, nor the question involved distinguishes the jurisdiction of the court from that of a division;"

6. "In each case, the judgment of a division is the judgment of a court of last resort, and ends the matter decided."

In *State* v. *Haney,* 168 Mo. 167, 67 S. W. 620, the Court held that the transfer of a cause to the court en banc *was not an appeal.*

In *Frohman* v. *Lowenstein,* 303 Mo. 339, 260 S. W. 460, the court en banc said:

"In a sense we have three separate courts for the hearing of cases. We have Division One, Two and the court en banc."

A transfer to the court en banc is not a review of a divisional opinion but a rehearing. The effect of granting a transfer is the same as granting a rehearing. The divisional opinion is set aside by the division itself so that the case may be submitted anew to the court en banc and the case stands as though it had never been submitted. New or amended abstracts of the record may be filed, new briefs submitted and new arguments made. The hearing en banc may extend to points not raised in or determined by the division. The opinion may be based on an entirely different matter than the opinion in Division.

In *Morris* v. *K. C. etc. Co.,* 303 Mo. 475, 258 S. W. 431, it is said:

"However, upon rehearing in a division, or after transfer to the court en banc, a case stands just as if it had not been previously heard and submitted."

To the same effect, see, also:

Frohman v. *Lowenstein,* 303 Mo. 339, 260 S. W. 460.

Sutton v. *Anderson,* 326 Mo. 304, 31 S. W. (2d) 1026, 1030.

Smith v. *K. C. Pub. Service Co.,* 328 Mo. 979, 43 S. W. (2d) 548, 555.

Fears v. *Newman Merc. Co.,* (Mo. en banc), 156 S. W. (2d) 909, 910.

Morgan v. *Kroger Gro. Co.,* (Mo. en banc), 154 S. W. (2d) 44, 46.

In the last cited case, the opinion of a division dismissed the appeal because of a defective brief and abstract. On a dissent of one of the judges, the case was transferred to the court en banc. The appellant filed a new abstract and brief. Since the point on which the division decided the cause, had been cured before submission to the court en banc, the court en banc considered the merits of the case where the divisional opinion passed only on the motion to dismiss.

We find, therefore, that this Court in the Gorman case did not have the benefit of the Missouri decisions when it held that a cause even under the first clause of Section Four "could, on petitioner's application, be transferred to the full court for *review* and the decision and judgment rendered by Division One *could be set aside by the Court sitting en banc.*"

Under the Missouri law, the decision of a division is not "reviewed" by the court en banc, neither can it be "set aside by the Court sitting en banc." The division of the Court sets the opinion aside when it grants the motion to transfer and leaves nothing for the court en banc to "review or set aside."

Where a court has the power of appellate review, its power is confined to passing on the correctness of the rulings of the court below and remanding it to that court for further proceedings. The court en banc, upon a

transfer from division, is not confined to a consideration of the points raised in division and does not review the divisional opinion but reviews the actions of the trial court as though the division had never passed upon the case. Authorities, *supra.*

Under the Missouri practice and procedure a motion to transfer after final decision is the same thing as an application to file a second petition for rehearing. For purposes of review in this Court, the filing, granting or refusal thereof has nothing to do with the statutory requirement that the decision be that of the highest court of the state, but only bears on the question of the time when the judgment to be reviewed became final. Although the Court may in its discretion entertain such motions, and having entertained them may, in its discretion, grant them for reasons of its own, this amounts to a rehearing rather than an appellate review. A petitioner is not required to conjure up a second application for rehearing as a prerequisite to review by this Court. However, had the Court permitted the filing of such a motion and had it been entertained the judgment would not have been final until it had been overruled. Had such a motion been filed, and had the Court refused to entertain it, the judgment would have been final as of the date the original motion for rehearing was overruled, and petitioner's time to apply for certiorari would have run from that time. Although a party is not required to file a motion for rehearing in order to have a final judgment, if he does file one and it is entertained, his time to apply for certiorari runs from the overruling thereof.

In *Gypsy Oil Company* v. *Escoe,* 275 U. S. 498, 48 S. Ct. 112, after an adverse decision in the state court, the losing party filed a timely petition for rehearing

therein, which was denied. An application for leave to file a second petition for rehearing was filed with the Court and thereafter leave to file it was denied. In discussing the time in which proceedings should be filed in the Supreme Court, this Court said:

> "But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presence of a motion for leave to file a second request for rehearing. If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

Since no motion for rehearing by the court en banc was filed, the judgment became final when Division Two overruled the motion for rehearing unless it should change its opinion and judgment of its own motion at the same term.

> *State ex rel. Berkshire* v. *Ellison*, 287 Mo. 654, 230 S. W. 970, 971.

(d) Finality of Opinion.

Although respondents do not claim that the judgment of Division Two was not final, they have cited the case of *Andrews* v. *Virginian Ry. Co.*, 248 U. S. 272, 39 S. Ct. 101. The case did not involve the proposition here urged concerning a judgment of the "highest court", but the holding therein was exclusively confined to a determination of when a judgment became final for purposes of review by this Court. The only direct holding made in that case was that a state court judgment for purposes of applying for a writ of error in the Supreme Court of the United States could not be final while an application for appeal to the highest state court was pending, under a clear, fixed right to make such applica-

tion, though its granting was "gracious or discretionary" and not "imperative or obligatory". This for the reason that otherwise "a judgment of a state court susceptible of being reviewed by this Court would, notwithstanding that duty, be open at the same time to the power of a state to review and reverse, thus, in substance, depriving each court of its power and begetting the possibility of conflict and confusion."

In the present case, there could be no question but that the judgment of the state court was final at the time the petition for certiorari was presented and that there could be no possibility of further review in the state court.

Petitioner had filed a motion for rehearing in Division Two under the provisions of Rule 21 of the Missouri Supreme Court. This was overruled on March 13th, 1942 (Rec. 556). At this time, Division Two had certainly made a final disposition of the cause within the meaning of Rule 24. If any right existed to file an application in Division Two for a transfer to the court en banc under the second clause of Section Four of the amendment, it had to be done (under rule 24) within ten days of the overruling of motion for rehearing under Rule 21 and, therefore, any power petitioner might have had to call into play the discretion of the Court for a further rehearing, expired on March 23rd, 1942, ten days after the motion for rehearing was denied. Thereafter, on the 25th day of March, 1942 a mandate was issued by the Supreme Court of Missouri, directed to the Circuit Court of Jackson County, Missouri, under the provisions of Section 1235, R. S. Mo. 1939.

This mandate was thereafter returned to the Supreme Court of Missouri, so that this petition could be filed in this Court. The withholding of the mandate on

such application to permit petitioner to apply to this Court for a writ of certiorari did not extend the jurisdiction of the Court to make a different determination of the case.

Aetna Ins. Co. v. *Hyde*, 327 Mo. 115, 34 S. W. (2d) 85.

The present case was determined at the September, 1941, term of said Court. Said term of court expired May 4th, 1942, at the beginning of the May, 1942, term of said Missouri Supreme Court.

Section 2047, R. S. Mo. 1939, provides:

"The regular terms of the Supreme Court shall hereafter commence on the first Tuesday of May, and the first Tuesday of September in each and every year."

Even had the last part of Section Four of the Amendment of 1890, given division two power on its own motion to transfer the cause to the court en banc after the expiration of the ten days mentioned in Rule 24, such power would have expired at the end of the term and no power to change the judgment in matters of substance would have remained.

Aetna Ins. Co. v. *Hyde*, 327 Mo. 115, 34 S. W. (2d) 85.

It is unquestioned, then, that at the time this writ was applied for on June 11th, 1942, the judgment of the Supreme Court of Missouri was final and no jurisdiction existed in any state court to change or alter it.

Conclusion.

It appears that under the decisions of this Court, and under the decisions of the Missouri Supreme Court to which we have drawn attention:

1. The court en banc is not a higher court than either division and has no supervisory power over a division and cannot review or set aside the judgment of the division.

2. That a party is not required to voluntarily attempt to arouse or excite some discretionary power of the division to transfer the cause to the court en banc.

However, the precise question involving the identical sections at issue here has never been raised in this Court in the exact manner now raised by respondents.

Under these circumstances, the entire matter should be determined by this Court so that the question may never again be raised and the entire matter will be settled for the future.

Petitioner has thoroughly analyzed and distinguished all of the cases cited by respondents on the merits of the present case in the original petition and will not prolong this reply brief by entering into any discussion thereon.

Respectfully submitted,

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10

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 140.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

RESPONDENTS' RESPONSE TO PETITIONER'S REPLY BRIEF.

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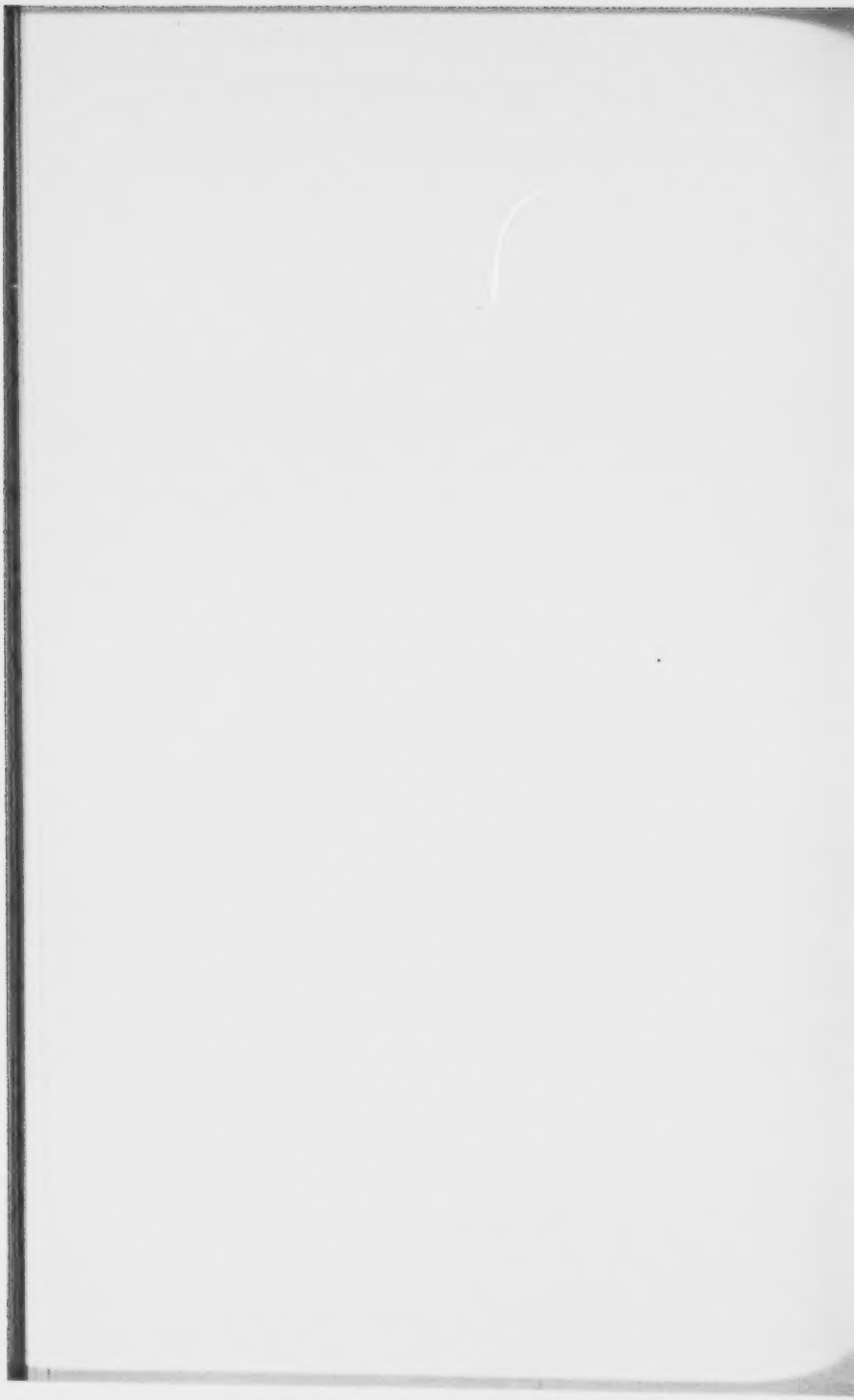

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RESPONDENTS' RESPONSE TO PETITIONER'S REPLY BRIEF.

This Court Does Not Have Jurisdiction.

Petitioner in his reply brief contends that Division Two of the Missouri Supreme Court is the highest Missouri court in which a decision could be had. Such contention is clearly unsound under the opinion of this court in the Gorman case and the opinion of the Missouri Supreme Court in the Scheufler case. In the Gorman case this court also declared

> "that no decision of a state court should be brought here for review * * * until the *possibilities* afforded by state procedure for its review by all state tribunals have been exhausted" (italics ours).

And in the opinion in the Scheufler case the Missouri Supreme Court declared that

> "under the last clause of this section, either division, *on application* or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court *en banc*" (italics ours).

This *per curiam* declaration by the Missouri Supreme Court was made expressly in the light of the Gorman opinion. It is a plain pronouncement of the rights of a losing party in Division and of Missouri procedure for the guidance of bench and bar. It expressly approves the Missouri practice of the transfer by a Division of causes to the court *en banc* on application of the losing party for reasons deemed sufficient, even though not enumerated in Section 4. This practice is illustrated by the typical examples set out in Exhibits 2 and 3 in the Appendix to respondents' original brief.

Petitioner also contends that under the last clause of Section 4 a case is not *pending* in division after the motion for rehearing has been denied. This contention is unsound because, even though a division has denied the motion for rehearing, nevertheless the cause is still pending in such division until its mandate goes down or until it is transferred to the court *en banc* as contemplated by Section 4 and Rule 24. That this has been the construction of Section 4 and Rule 24 by the Missouri Supreme Court is illustrated by the action in the Klotsch case set out in Exhibit 3, page 23, of respondent's original brief and in Exhibit A attached to this brief. These exhibits show that after Division Two denied the motion for rehearing, motion to transfer was filed and granted under the last clause of Section 4. Said Exhibit A shows that the motion for rehearing was filed in Division Two on June 19, 1941, and was overruled on July 25, 1941. Said Exhibit 3 shows that the motion to transfer was filed in Division Two on the 4th day of August, 1941, within ten days after Division Two had finally disposed of the case as contemplated by Rule 24. The Klotsch case illustrates that the Missouri Supreme Court has construed Section 4 and Rule 24

to mean that a cause is *pending* for the purpose of transfer under the last clause of Section 4 after it has been finally disposed of in division by the denying of the motion for rehearing.

On page 4 of his reply brief, the petitioner discusses *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U. S. 102, 50 Sup. Ct. Rep. 42, 74 L. Ed. 207, *Minneapolis, etc., R. Co.* v. *Rock*, 279 U. S. 410, 49 Sup. Ct. Rep. 363, 73 L. Ed. 766, both of which cases came up to this Court from Illinois. In Illinois, judgments of appellate courts (intermediate) are reviewable by the Illinois Supreme Court where a majority of the judges of the appellate court make certificates of importance and grant appeals, or where such judgments are brought up by the certiorari issued by the Illinois Supreme Court. In the Rock and Mihas cases, applications for certiorari to the Illinois Supreme Court had been denied. No applications were made to the appellate courts for certificates of importance. This Court held that the denials of certiorari by the Illinois Supreme Court were decisions of the highest court of that state in which a decision could be had, because, under the Illinois law, the denial of certiorari by the Supreme Court of Illinois is an affirmance of the judgment of the appellate court, *i. e.*, a decision by the Illinois Supreme Court that the case was correctly decided.

The cases of *Betts* v. *Brady*, 86 L. Ed. 1116, and *Southern Railway Company* v. *Clift*, 260 U. S. 316, cited by petitioner, merely hold that after the highest court of a state has decided a case on the merits it is not necessary to request that court to again decide the case, as a prerequisite for this court's jurisdiction.

Petitioner then argues that a motion to transfer is in effect a motion for rehearing and that since Division Two of the Missouri Supreme Court had decided the case and denied rehearing that it was useless to apply to it for transfer. How does he know that? The issues on which a Division decides a case are not the same as those involved on motion to transfer. The Division judges

might be firmly of the opinion that they had decided a case correctly and yet conclude for reasons set forth by petitioner in an application that the case should be transferred to the full court for its decision, for example, because of conflict between decisions of divisions, or because a matter of importance is involved or for any other reason deemed sufficient though not enumerated in said Section 4. A losing party in Division who has not applied for transfer has not exhausted his possibilities for review by the Court *en banc.*

Petitioner in his reply brief contends that *he* had no *right* to a transfer to the court *en banc* and that he could not *compel* the transfer of the cause. The question is one of the *court's power* to transfer the case on motion by petitioner. Since it had that power and petitioner did not apply for its exercise, he has not exhausted his possibilities for review by the highest court of the state.

We respectfully submit that this Court does not have jurisdiction to review the decision and that the petition for certiorari should be denied.

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Attorneys for Respondents.

EXHIBIT "A."

No. 37124

IN THE SUPREME COURT OF MISSOURI
MAY TERM, 1941

EDWARD F. KLOTSCH, RESPONDENT,
VS.
P. F. COLLIER & SON, A CORPORATION, AND ELMER U. McATTEE, APPELLANTS

I, E. F. Elliott, Clerk of the Supreme Court of Missouri, hereby certify the motion for rehearing in the above entitled case was filed in this office on June 19, 1941, in Division Number 2 of this Court; also, the motion for rehearing as filed herein was denied by Division Number Two of this Court on July 25, 1941.

Given under my hand and seal of said Court, at the City of Jefferson City, this 22nd day of September 1942.

(Seal)

E. F. ELLIOTT,
Clerk.

.....
D. C.